



Delay of Justice in Ethiopia and the Genocide trial of Derg Officials

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Executive Summary

This study deals with the protection of the right to speedy trial by Ethiopia courts. Ethiopia ratified International Convention on Civil and Political Rights, ICCPR which recognized the right to speedy trial and other rights for persons accused of any criminal activities. Also this right has constitutional recognition under the country's constitution. Right to speedy trial, an element of fair trial rights is a fundamental guarantee important for the enforcement of other rights without exception to the crimes involved. Nevertheless, due to legal and practical problems speedy trial right in Ethiopia has suffered a great deal of limitations and violations at most. In Ethiopia it is a common fact for cases to spend many years before the court pass judgment. The paper assumes the absence of a judicial test is one reason for these prevalent delays. Hence, to resolve this problem the study employs the Barker test developed by US courts to resolve violations of right to speedy trial by appellate or trials courts.

The national courts of Ethiopia have also prosecuted the officials of the former government on genocide and crimes against humanity through trials that took more than a decade. However, these trials were challenged on the amount of time they took in addition to other things. Therefore the test will be used to evaluate whether the famous trial of the Former President of the country and his top officials suffered a delay in violation of right to speedy trial. Eventually, Colonel Mengistu Hailemariam case had in fact suffered an uncommon delay due to reasons caused by all the parties including problems related to the legal system. And most of these reasons were caused by parties other than the defendants. Because of this the defendants in the case are entitled to benefit from right to speedy trial claims that obligates the charges to be dismissed.

Chapter 1

Introduction

According to United Nations' Human Rights Committee decision in *Gonzalez Del Rho v. Peru*¹ 'The right to fair trial is an absolute right that may suffer no exception'. Additionally the right to fair trial assumes a fundamental foundation for the enforcement of all other human rights recognized in various international human rights instruments². Such unequivocal position of the committee clearly affirms the importance of the right in any human rights system. Correspondingly, the right to speedy trial an element of the right to fair trial is therefore an absolute right that may suffer no exception even when the trial is for genocide and crimes against humanity.

A right which has this much importance and significance logically demands a whole lot of protections appropriate to enforce the rights particularly by the judiciary. After all courts are primarily responsible and empowered to enforce human rights on time of violations³. Hence, this protection by courts is indispensably mandatory not only to enforce fair trial rights alone. Rather it is necessary because such protection of fair trial rights is directly linked also to the need to protect other rights which subsequently increases the need for immediate protections of fair trial rights. Consequently the violation of this right fundamentally entails apparent violations of other rights apart from affecting the legitimacy of the trial by making it difficult to achieve the objectives of the

¹ *Gonzalez Del Rho v. Peru*, Communication No. 263/1987, U.N. Doc. CCPR/C/46/D/263/1987 (1992).

² Hailegabriel, Debebe, *Prosecution of Genocide at International and National courts: A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/Rwanda*, a dissertation submitted in partial fulfillment of the requirements of the degree LLM (Human Rights and Democratization in Africa), Faculty of Law, University of Pretoria, 2004, page

³ *Ibid* page 1.

adjudication process itself⁴. Because of all these importance a country's status in the protection of fair trial rights by its courts can speak of the level of comprehensive human rights respect and enforcement domestically.

Apparently Ethiopian human rights record regrettably falls far from what it should have been. The government has been severely criticized because of its human rights accounts by international human rights institutions and countless countries despite its commitment reflected in many international human rights treaties. Ethiopia so far has never furnished its first periodic report to some of the major human rights treaties it has signed including on ICCPR⁵. Similarly fair trial rights including the right to speedy trial are recognizably enforced poorly in the country. It is common to hear people preferring to be sued than the other way round due to undeniable lengthy trials. Such widespread misfortune did not even miss high profile trials like the genocide trials of the high ranking officials of the Derg government. In fact almost all of the trials including the famous trial of Colonel Mengistu Hailemariam et al⁶ were lengthy beyond any doubt.

However, it is well comprehensible for complex criminal cases to take more time than simple ones. Types of crime directly affect the reasonable amount of time logically needed in a trial nonetheless this reasonableness are not beyond limits. Constitutional and international guarantees are effective limits which still obligates the trial to respect the accused's right to speedy trial. Therefore, evaluation of speedy trial in complex crimes

⁴ A trial shall lose reliability due to delay and other causes attached to the process as limitations. Measurement of the reliability then requires correlating the original objectives set out by the trial and the actual ends it had managed to achieve. Further discussions on the reliability aspect of prosecution and how limitations on the process affect the reliability of the trial are in order in the later chapters.

⁵ Currently Ethiopian Human Rights Commission and Ministry of Foreign Affairs with financial and technical support of United Nations High Commission for Human Rights are moving to finalize the delayed State Reports on ICCPR, ICESCR and other treaties which Ethiopia is obligated to provide periodic reports on its accomplishments enforcing these rights in the country.

⁶ Special Prosecutor v. Col. Mengistu Hailemariam et al., File No 1/87, Ethiopian Federal High Court

like genocide should expect certain reasonable delays. But how it is possible for one to tell some delays are reasonable or unreasonable which is a sufficient ground to effect violation of right to speedy trial. In order to answer this question the study uses a test to detect whether a genocide trial which took more than 12 years is rather a reasonable delay.

The Ethiopian national courts prosecuted members of the former government in the efforts an unprecedented anywhere else in Africa for crimes that are labeled as the world's seventh worst genocide in the 20th century⁷. The government's account of the massive killings of people by the former government was crimes of genocide in violation of Ethiopian criminal law. Furthermore the US government and other countries as well accepted this understanding and supported the efforts. The Prosecution was taken ultimate to bring peace and stability to the country which just got out of civil war that caused many years of constant bloodbath. Although the critical importance of this prosecution could not be an excuse to deny all human rights afforded to the officials who stand prosecutions for genocide and crimes against humanity. Unfortunately, the genocide trials were strongly criticized by a wide range of commentators and human rights institutions⁸ concerning on the fair trial rights of defendants.

One of the critics of the trial was the amount of time it took before the defendants received judgment on the trials. Then this study is a project to discern whether the

⁷ See <http://www.scaruffi.com/politics/dictat.htm>, visited 10 October 2009, see also Tiba, Firew, The Mengistu Genocide Trial in Ethiopia, *Journal of International Criminal Justice* 5, 2007, page 513-528.

⁸ Amnesty International and Human Rights Watch duly reflected their great concern on the fair trial rights of the accused through the entire trial process. Academic voices were also shared this concerns. See <http://www.hrw.org/reports/pdfs/e/ethiopia/ethiopia94d.pdf>, visited 11 October 2009; see also <http://www.amnesty.org/ailib/airport/ar97/AFR25.htm>, visited 11 October 2009; see also Tiba, Firew, The Mengistu Genocide Trial in Ethiopia, *Journal of International Criminal Justice* 5, 2007, page 513-528, page 527.

comment on the length of genocide trials was quite a conclusive concern in connection with violation of defendants' rights. The study attempts to understand and evaluate the protection of right to speedy trial of the defendants through a judicial test often referred as the Barker test. The test was devised by US courts in *Barker vs. Wingo*⁹ case in its endeavor to evaluate whether the accused's right to speedy trial was violated or not. Barker test is used here to understand the specific protection of the right and the effects of the violations. The test provides an ad-hoc basis for lower courts to analyze the respective factors crucial in determining whether a speedy trial violation has occurred¹⁰. Beside the test can also be used by higher courts to correct convictions on criminal cases which had suffered extraordinary delays.

Hypotheses / Research questions

The paper recalls the role of the judiciary in human rights protection. This is therefore the fundamental responsibility of Ethiopian courts as well. Hence, the paper assumes the absence in Ethiopia of a judicial test for the courts to put into effect the right to speedy trial and protect defendants from violations thereof contributes for cases to be delayed. Based on this assumption, this study instigates the application of the US Supreme Court's test on speedy trial right by Ethiopian courts, to the lengthiest genocide trial in the world, Col. Mengistu's genocide case.

Additionally, the study also assumes the right to fair trial, including speedy trial possessing a fundamental ground for the respect and enforcement of the other rights. Similarly the protection of this right entails a protection of other rights and vice versa. A

⁹ *Barker v. Wingo*, 407 U.S. 514 (1972)

¹⁰ Wernikoff, M. Steven, Sixth Amendment-Extending Sixth Amendment Speedy Trial Protection to Defendants Unaware of their, *The Journal of Criminal Law & Criminology*, Vol. 83, No. 4 Copyright, 1993 by Northwestern University, School of Law Printed in U.S.A, page 819

trial that does not respect speedy trial will lose its legitimacy, as the outcome of the trial will be a violation of the right to fair trial and other individual rights. Therefore, the study employs a test on speedy trial, by taking into account the above hypothesis to evaluate the protection of this right in the Ethiopian most famous genocide case.

Within the above assumptions vis-à-vis the case, the study poses the following research questions,

1. Whether Mengistu's genocide case had suffered uncommon delay, which is a violation of the right to speedy trial of the defendants?
2. If this right is violated, what should be the remedy for the violation?

Significance of the study

By understanding the various natures of speedy trial and its violations, the study aims to push the necessity of using a test for the protection of speedy trial right in any case brought before a court, especially for cases that suffered delay. Application of the test is instrumental for the courts to better understand the right itself and to maintain their primary role as protector of human rights by securing the reliability of their decisions. Consequently, the paper aspires to identify the prejudicial effects of violations of the right by showing how much the delay affects the defendants' ability to defend his case.

The primary value of the research, therefore lies in its contribution to the capacity of Ethiopian courts on human rights oriented understanding of speedy trial and the means to guarantee this right. The Barker test can be a useful guide for the Ethiopian courts in their daily activities to ensure the rights of defendants and also to reaffirm the human rights role of the judiciary in the country. Moreover, the paper can be a good material for those who seek to understand the protection of speedy trial and its applications by courts.

Besides, the study enriches current knowledge on the field of fair trial rights and due process of law too.

Literature review

The issues that are addressed in this study have fairly received discussion by a number of scholars in general and in ways much different from this study. There are many scholars that have written about the right to fair trial generally, speedy trial in particular and discussion on the general nature of the Barker test and cases in which the US courts applied the test.

In Galligan's¹¹ general analyses of due process and fair trial rights, he wrote about the theoretical features of these rights and in addition discussed the different understanding of the British and the American system on the sources, scope, categorization of the rights and the system of protections that can be used in the two systems, before he goes discussing specific due process and fair trial rights. This study took recognizable amount of inspiration from his book on analysis of fair trial rights. However, his work is too comprehensive discussing wide range of subjects not limited to one specific due process and fair trial rights.

Tinsley¹² discussed about right to speedy trial particularly in connection with delay, which is a violation of the right with constructive analyses on the sources and purposes of speedy trial in the American legal system along with the effects of violations of the right. His analysis of the right is respectfully used as a source in this study. Nevertheless, this article does not attempt to integrate the protection of the right into a real case to make the

¹¹ D.J. Galligan, *Due Process and Fair Procedures, A Study of Administrative Procedures*, Clarendon press, oxford, 1999

¹² Jimmie E. Tinsley, *Prejudice Resulting from Unreasonable Delay in Trial*, J.D. American Jurisprudence Proof of Facts 2d, Database updated July 2008

discussion more clearly by outlining the practical applications of the specific guarantees of the right.

Mengistu's genocide case received a full attention in Tiba's¹³ article about his analyses of the historical background of the Derg regime, which led to the genocide trial and the sentences passed against Mengistu and his co defendants in this major African trial, which holds a whole system criminally responsible. Tiba briefly discussed the divided judgments and sentences in the case, including the reasons that led to the split in this important case, before he mentioned some problems he observed from the trial, including legal representation and lengthy trial. This study therefore took the scholarly description of the trial from Tiba's article. Tiba even if he only wrote about the famous genocide trial of Mengistu, however, did not pay great attention to the rights of the defendants even when he raised the limitations of the trial as problems.

Kiss¹⁴ is another scholar, who wrote about the genocide of Ethiopia in his project to comparatively scrutinize the alleged genocide and crimes against humanity in Ethiopia by Derg regime with the Cambodian counterpart committed by Khmer Rouge regime under the leadership of Pol Pot. Kiss reviewed the background theories of the crimes itself in the academic theories of social, legal and political issues often raised on genocide and crimes against humanity. Furthermore, he analysed them with applicable domestic laws and international laws on crimes of genocide based on the accounts of the actions committed against the respective people of the countries before he decide whether the crimes could be considered genocide or not in both countries. Throughout his article, he

¹³ Tiba, Firew, The Mengistu Genocide Trial in Ethiopia, *Journal of International Criminal Justice* 5, 2007, page 513-528

¹⁴ Kiss, Edward, *Revolution and Genocide in Ethiopia and Cambodia*, Lexington Books, UK, 2006.

relates the genocide trials with existing academic knowledge of this crime and its effects in the domestic politics of the country. Even if Kiss's book mainly focuses on academic evaluation of the crimes of genocide in Ethiopia, this study uses some of his views on the genocide trials in Ethiopia. However, this book does not give specific attention to Mengistu's trial, but it occasionally uses the trial process to substantiate certain arguments on the major issues of the book.

Comparative evaluation of the prosecution process of the crime of genocide by national courts and international tribunals was persuasively conversed by Hailegabriel¹⁵. He took consideration of the recurrent prosecutions of crimes of genocide by national and international tribunals on what has seemed on the same crime. In addition, he sought to investigate the causes and impacts of the different approaches followed by these two systems on the fair trial rights of the defendants. Hailegabriel identified some of the detrimental effects of these differences on the rights of the defendants using the Ethiopian and Rwandan national genocide trials in comparison with the ICTY and ICTR. Finally, he gave recommendations on the need and ways how to rectify these differences for the future. Hailegabriel thesis was used by this study as an important source on several issues. But the need to understand and enforce the rights of defendants does not necessarily lie by closing these apparent differences of approaches; it should also be recognized within the existing national systems first.

As one could clearly recognize latter in the coming chapters the study receives a great deal of inspirations on most of the issues included in the study from the above writers.

¹⁵ Hailegabriel, Debebe, *Prosecution of Genocide at International and National courts: A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/Rwanda*, a dissertation submitted in partial fulfillment of the requirements of the degree LLM (Human Rights and Democratization in Africa), Faculty of Law, University of Pretoria, 2004

Although what is relatively novel in this study therefore is its attempt to interpose speedy trial right in Mengistu's genocide trial using a judicial test to evaluate the protection of the rights by the trial court.

Methodology

The fundamental concept of this study is the right to fair trial, particularly to speedy trial of an accused and its protection by courts. A particular interest was made on the genocide trial of Col. Mengistu Hailemariam. This case was used as a case study to see its practical application. The test is employed to the case to understand the specific protections, the violation of the right and the appropriate remedy for the violation before deciding whether the Federal High Court of Ethiopia correspondingly respected the speedy trial of the defendants, when the case obviously lasted for more than 12 years before judgment.

To clearly see the analysis of the right and the application of the test, a discussion of these concepts are dealt with in the coming chapter along with discussion on genocide for better understanding of the situations surrounding the case.

The scope of this study is only limited to the extent of analyzing theoretical aspect of speedy trial right and its protection by courts based on the Barker test.

The study paper uses mainly analytical methods, even though description is employed when necessary. International human rights treaties, laws, cases and legal analysis are used to analyze the protection of speedy trial right in the case study. The study is additionally assisted by information gathered through interviews of persons who were judges and prosecutors on matters that are difficult to acquire from books or articles. Nevertheless, the rest of the study is based on information gathered from library and

internet sources. The availability of sufficient materials, especially on Mengistu's trial was the biggest challenge on top of other time related problems.

Summary of chapters

The study is divided into five chapters. The first chapter outlines the introduction, objective and significance of the study. The theoretical part of the main issues shall be discussed in detail in the second chapter. Chapter three discusses genocide trials in other countries in order to grasp the general circumstances about prosecuting the crimes of genocide. Chapter four outlines introductory issues to the Ethiopian legal system to give readers an understanding of the system. The analyses of Mengistu's case with the Barker test is dealt with in chapter five, before the study finalizes the paper with conclusions which could also be taken as recommendations for the problems identified in the system.

Chapter Two

Theoretical Framework

This paper is primarily focused on speedy trial right in Ethiopian legal system vis-à-vis the genocide trials of the Derg regime. For a better understanding of the right and the denial of the right, a theoretical analysis of procedural rights particularly speedy trial and the test that could be used to identify the denial are necessary, which will take place in this chapter.

Procedural due process of law

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person¹⁶. Fair trial rights guarantee the process of determining rights by courts and one of the procedural guarantees in fair trial is the right to speedy trial¹⁷. Before discussing the elements of fair trial, namely speedy trial, discussion of procedural guarantees in the American¹⁸ and British system is important here to understand speedy trial guarantees in a legal system and necessary to decide the usage of consistent terms.

The concept of procedural guarantees as part of a protection of fair trial right is different between the American and British legal system. The concept of procedural guarantees in

¹⁶ What is fair trial?, A Basic Guide to Legal Standards and Practice, March 2000, Lawyers Committee for Human Rights, http://www.humanrightsfirst.org/pubs/descriptions/fair_trial.pdf, visited May 7, 2009.

¹⁷ Procedural guarantees encompass pre-trial rights, protection of hearing process and post-trial rights including speedy trial right as elements of the hearing where the accused or the person whose rights and obligations shall be decided to get trial without undue delay. See supra noted # 1

¹⁸ The importance of discussing the American and British concept of procedural guarantees arise from the need to introduce a coherent theoretical background about fair trial rights and to get inspiration from them for Ethiopian legal system on procedural rights.

the British system is understood in terms of procedural fairness¹⁹. On the other side “procedural fairness in American law is based around the doctrine of due process of law”²⁰. The American concept of due process, however, does not mean that it is different from the English one. Considering the history of American due process, we can understand that scholars took the history of due process protection from the Magna Carta and from the early American colonies and a lot from common law from the British²¹.

However, there is no definite and concrete answer as to the differences and similarities of the procedural fairness and due process. Galligan argued that, “due process and procedural fairness go together, but it is not always clear whether they mean the same thing or what the differences between them are. The notions of due process has become associated with certain doctrines, both substantive and procedural, arising under the American constitution, while procedural fairness is more at home in the British context, although even here the term commonly used until now is natural justice”²²

Furthermore, Galligan added that even if the American concept of due process recognized certain interpretation of procedural fairness, yet maintains some differences from its British counterpart. For example, the British concept of procedural fairness covers a wider aspect of issues than due process of the Americans and procedural fairness of the

¹⁹ D.J. Galligan, *Due Process and Fair Procedures, A Study of Administrative Procedures*, Clarendon press, oxford, 1999, page 188

²⁰ D.J. Galligan, *Due Process and Fair Procedures, A Study of Administrative Procedures*, Clarendon press, oxford, 1999, page 188

²¹ Thompson, Faith, *Magna Carta: its role in the making of the English constitution 1300-1629*, Published by READ BOOKS, 2007, page 68 to 99. s, Thorne, w. Dunham, p. Kaarland, and I Jennings, *the great charter: four essays on magna Carta and the history of our liberty* (Pantheon, New York, 1968)

²² Ibid, page 73

British arises from the common law unlike the Americans' due process which is evolved from constitutional provisions²³.

Due process law has two distinct elements, substantive and procedural due process. This kind of distinction is more often used by American scholars than the British ones²⁴. Substantive due process in American jurisprudence is a constitutional guarantee that is provided in the Fifth and the Fourteen Amendments. Both Amendments prohibit State and Federal authorities from depriving individuals of the right to life, liberty and property without due process of law²⁵.

Substantive due process is a 'limitation on the power of the state and federal legislatures, and of any other legal and administrative body, to deprive life, liberty and property' without due process. On the other hand, procedural due process of law, which is the focus of this paper, is a limitation on the government authority to observe certain procedures whenever they take action to deprive the right to life, liberty and property. Procedural due process in the American legal system to the minimum obligates the state to notify the individual whose rights are under consideration and to give him the opportunity to be heard²⁶.

According to Pennsylvania's Legislature Desk book, procedural due process protection is defined as a method by which persons could challenge unjustified deprivation of life,

²³ D.J. Galligan, *Due Process and Fair Procedures, A Study of Administrative Procedures*, Clarendon press, oxford, 1999, page 188.

²⁴ D.J. Galligan, *Due Process and Fair Procedures, A Study of Administrative Procedures*, Clarendon press, oxford, 1999, page 190.

²⁵ Amendment V: '[N]or shall any person ... be deprived of life, liberty, or property, without due process of law.' Amendment XIV: '[N]or...shall any state deprive a person of life, liberty, or property, without due process of law.'

²⁶ Pennsylvania Legislator's Municipal Desk book, Third Edition (2006), http://www.lgc.state.pa.us/deskbook06/Issues_Citizens_Rights_03_Procedural_Due_Process.pdf, last visited March 11, 2009

liberty, or property proposed by the government²⁷. The particular elements that a person could contest the proposal include, notice, hearing, impartiality, the right to have a counsel, the right to access to evidence and as well as reasoned decision. Therefore, the American concept of procedural due process is a guarantee for individuals to challenge the proceeding concerning their rights before a competent organ and for this the minimum procedural guarantees is the right to be notified and heard. Additionally procedural guarantees in America legal system encompass the right to be tried by jury, and to receive speedy trial according to the Sixth Amendment²⁸.

Procedural due process (of the American concept) covers much the same ground as procedural fairness in English law, but we (according to Galligan) must not assume that the one is simply another way of expressing the other. Galligan reasoned this distinction by giving the following instances, firstly he said that, procedural due process has a much narrower and more specific meaning than procedural fairness, and secondly, the American doctrine is only limited to actions which affect life, liberty and property.²⁹

United States Supreme Court in *Klopfer v. North Carolina* case decided that speedy trial right is one of the basic fundamental guarantees and liberties protected by the constitution and additionally affirmed its application to States jurisdiction by virtue of due process clauses of the Fourteenth Amendment. Therefore, it is logical to assume that speedy trial right which is an element of fair trial right is a protection guaranteed by procedural due

²⁷ Pennsylvania Legislator's Municipal Desk book, Third Edition (2006), http://www.lgc.state.pa.us/deskbook06/Issues_Citizens_Rights_03_Procedural_Due_Process.pdf, last visited March 11, 2009

²⁸ *Klopfer v. North Carolina*, 386 U.S. 213 (1967), the Supreme Court decided that due process protection also protects the other rights included in the constitution, specifically for the particular case, the right to get speedy trial provided under the Sixth Amendment.

²⁹ D.J. Galligan, *Due Process and Fair Procedures*, A Study of Administrative Procedures, Clarendon press, oxford, page 189

process clauses of the Fifth and the Fourteenth Amendments and additionally by the Sixth Amendment of American constitution.

The objective of this part is to show how speedy trial right is conceived in the American constitutional system as part of the procedural due process guarantee. Accordingly efforts were also made to show the similarities and differences of theories of procedural fairness and due process of law before going into a deeper analysis of speedy trial right in the next section.

2.2 Speedy Trial Right and Delay of Justice

The right to equality before the courts and tribunals and to a fair trial (speedy trial right being an element of fair trial right) is a key element of human rights protection and serves as a procedural means to safeguard the rule of law³⁰. United Nations' Human Rights Committee in its decision in *Gonzalez Del Rho v. Peru*³¹ decided that fair trial is an absolute right that may suffer no exception. It is one of the fundamental rights widely accepted through international human rights instruments. The right to speedy right is a well recognized right in international human rights instruments that States parties agreed to respect and protect the right for all human beings in their territories.³² Fair trial right is so fundamental for human rights protection currently and because of this United Nations Human Rights Commission prepared a draft optional protocol suggesting fair trial right to be an absolute right³³.

³⁰ General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial Human Rights Committee, Ninetieth session, Geneva, 9 to 27 July 2007.

³¹ *Gonzalez Del Rho v. Peru*, Communication No. 263/1987, U.N. Doc. CCPR/C/46/D/263/1987 (1992).

³² The number of countries that ratified ICCPR can show its acceptance and wide recognition by countries, similar to the other rights included in the convention. ICCPR is ratified by 156 countries as of may 2006, www.ohchr.org/english/law/ccpr.htm

³³ WHAT IS A FAIR TRIAL?, A Basic Guide to Legal Standards and Practice, March 2000, Lawyers Committee for Human Rights; also *See* Draft Third Optional Protocol to the ICCPR, Aiming at

The right to fair trial is recognized under article 14 of ICCPR and the right to speedy trial or ‘the right to trial without undue delay’ is protected under 14(3) (c)³⁴ of the same convention. Speedy trial right is also a recognized right in regional human rights instruments including ECHR under article 6(1)³⁵ and African Charter on Human and Peoples' Rights article 7(d)³⁶. In addition to the international human rights instruments the Sixth Amendment³⁷ of the United States and article 20(1) of Ethiopian constitution which guaranteed trial without undue delay³⁸ are good examples for national protection of the right.

Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy, Annex I, in: “The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening,” Final Report, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Session, E/CN.4/Sub.2/1994/24, June 3, 1994, at 59-62.
(<http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/d8925328e178f8748025673d00599b81?OpenDocument>).

³⁴ Article 14 (3), In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: and (c) To be tried without undue delay.

³⁵ In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

³⁶ African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

³⁷ Amendment VI, In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

³⁸ Article 20 (1), Everyone charged with an offence shall be entitled to a public hearing before an ordinary court of law without undue delay; the trial may, however, be conducted in camera only for the purposes of protecting the private lives of the parties, public morals and moral security.

The United States Supreme Court recognized speedy trial right as “one of the basic rights perceived by (the US) constitution”.³⁹ The Supreme Court while explaining the right in the case *Klopfer v. North Carolina* reiterated the status of this right as one of the fundamental right and basic liberties⁴⁰ recognized in the constitution.

Historical account of the right demonstrates that speedy trial is one of the early recognized rights in the world. Protection of the right goes back to the first well noted document of individual rights, the Magna Carta⁴¹. In 1215 King John of England agreed to protect speedy trial rights of the Barons through protection against delaying of justice to all Barons in his empire. Moreover, there is also another view about the history of the right, which stated that the right was actually recognized even before the Magna Carta. The US Supreme Court in *Klopfer v. North Carolina* argued that the recognition of speedy trial predating the Magna Carta even going back to mid 12 century⁴². The court identified this recognition in the Crown promulgation of Assize of Clarendon in 1166. The Assize of Clarendon is a legal code comprised of 22 articles, and one of this articles promised speedy justice to all litigants during the reign of Henry II (1154–1189).⁴³

Speedy trial rights protection as recognized by the Magna Carta is the protection recognized for the barons, which obligates the king to respect the rights of the barons to get justice without undue delay and similarly the Assize of Clarendon provided a

³⁹ Speedy Trial, *The Journal of Criminal law and Criminology*, (1973), Vol. 68, no 4, Northwestern University School of Law, Dec. 1977, page 545

⁴⁰ *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967).

⁴¹ Rhonda Wasserman, *Procedural due process, A reference guide to the United States constitution*, published by greenwood publishing group, 2004, page 1-2

⁴² *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967); see also Herman, Susan N, *The Right to a Speedy and Public Trial: A Reference Guide to the United States Constitution*, Greenwood Publishing Group, 2006, page 162

⁴³ WHAT IS A FAIR TRIAL?, *A Basic Guide to Legal Standards and Practice*, March 2000, Lawyers Committee for Human Rights; Evidence that the right pre-dated even the Magna Carta may be found in Assize of Clarendon (1166).

protection to get speedy justice. Understanding such early recognition of the right could signify its importance and influence on contemporary legal system.

Historical account of speedy trial right in American history dates long before the drafting of their constitution. Most of the British colonies in America before the revolution and obviously before American constitution already had their own speedy trial right and due process protection in their own constitution⁴⁴. Besides the Congress of American Colonies which met in New York in 1765, declared that the colonies were entitled to all the rights and liberties confirmed by Magna Carta to all subjects of Great Britain⁴⁵.

‘The Framers of the [the United States] Constitution, being well versed in the philosophy of the Magna Carta and its interpretations in the English law, considered the right fundamental and included it in the Constitution’,⁴⁶ (emphasis added). After the American Revolution speedy trial protection and due process clause developed into constitutional guarantee in the newly ratified Federal constitution. The Sixth Amendment and due process guarantees of the Fifth and Fourteenth Amendments of the constitution served as a protection of speedy trial right. The significance of such early recognition for the rights can explain the importance it has to the general society and especially for the early beneficial, the barons and later when speedy trial rights becomes to be recognized as human rights for all humanity⁴⁷.

⁴⁴ For example, Virginia, Maryland and Massachusetts had provisions recognizing due process and speedy trial right under their constitution

⁴⁵ D.J. Galligan, *Due Process and Fair Procedures, A Study of Administrative Procedures*, Clarendon press, oxford, page 188

⁴⁶ D.J. Galligan, *Due Process and Fair Procedures, A Study of Administrative Procedures*, Clarendon press, oxford, page 189

⁴⁷ We can understand the importance of the right because according to General comment 32 on article 14 general reservation on the fair rights protected in article 14 of ICCPR is incompatible to the purpose and objective of the right.

After reviewing the brief history and emergence of speedy trial protection in the world the focus will be on the sources and purposes of the protection in American legal system. According to American legal system, speedy trial right can be invoked from six different sources⁴⁸. The first and explicit (express) protection is found in the Sixth Amendment⁴⁹, the second protection is found in the application of due process clause of Fifth and Fourteenth Amendments, thirdly, the protection is provided in different State constitutions,⁵⁰ fourthly, the protection is due because of Federal or State statutes promulgated for the protection of speedy trial,⁵¹ fifthly the right to a speedy trial is guaranteed in some jurisdictions by means of rules of court, and finally the guarantee may also be found in the common law.⁵²

Right to Speedy trial in the United States is protected by different rules starting from different constitutional provisions down to common law. However, with all these sources and protections the scopes of the protections differ based on the sources.⁵³ While discussing speedy trial right in any given legal system, we should note the specific purposes this right protects. For this reason, prompt examination of the purposes is

⁴⁸ Tinsley, Jimmie E., Prejudice Resulting from Unreasonable Delay in Trial, , J.D. American Jurisprudence Proof of Facts 2d, Database updated July 2008

⁴⁹ Amendment 6 - Right to Speedy Trial, Confrontation of Witnesses, Ratified 12/15/1791, In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

⁵⁰ Including the States of Virginia, Maryland and Massachusetts.

⁵¹ For Federal government, the Speedy Trial Act of 1974, 88 Stat. 2080, as amended August 2, 1979, 93 Stat. 328, is set forth in 18 U.S.C. §§ 3161-3174

⁵² Klopfer v. North Carolina, 386 U.S. 213, 226 (1967); see also Herman, Susan N, The Right to a Speedy and Public Trial: A Reference Guide to the United States Constitution, , Greenwood Publishing Group, 2006

⁵³ Tinsley, Jimmie E., Prejudice Resulting from Unreasonable Delay in Trial, J.D. American Jurisprudence Proof of Facts 2d, Database updated July 2008

important to have better understanding of the rights itself and to make constructive suggestions as to its protection by courts.

Speedy trial has several specific purposes which it protects. However, due to historical and legal facts in different legal system the purposes might be diverse. Time is also another factor to make the purposes different country to country. For example, Magna Carta guaranteed the interests of the Barons by recognizing right to speedy trial, trial by peers and due process rights.⁵⁴ Therefore, the purpose of such recognition was to protect the Barons from the powers of the kings. Today this protection is recognized for everyone without any sort of discrimination unlike the Magna Carta; hence protection of individual interests from infringement is one of the purposes of speedy trial. Therefore, the purposes identified below have accounted the human rights prospect of the right as the product of different historical and legal factors that became the foundations for the emergency of numerous human rights treaties, which recognized the universality of this right and other guarantees.

Tinsley argued that the purposes of the speedy trial guarantee are as twofold. The first one is that speedy trial protects the defendant's constitutional right to receive a speedy justice and, second, the right also serves public interests in bringing prompt criminal proceeding.⁵⁵

United States Supreme Court in the case *United States v. Ewell*⁵⁶ decided that speedy trial right serves as a guarantee to protect the defendant from undue delay and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public

⁵⁴ Tinsley, Jimmie E., *Prejudice Resulting from Unreasonable Delay in Trial*, J.D. American Jurisprudence Proof of Facts 2d, Database updated July 2008

⁵⁵ Ibid

⁵⁶ *United States v. Ewell*, 383 U.S. 116 (1966)

accusation and to limit the possibilities that long delay could impair the ability of an accused to defend himself.⁵⁷ Speedy trial guarantee, according to the purposes sited above by Tinsley and the Supreme Court's decision, could be understood as a constitutional protection of defendant from influences that could affect the fairness of the trial and from situations that could impair defendant's chance to properly defend her/his case. Furthermore, this safe guard extends to protect defendant against long term incarceration without convictions in addition to its guarantee to the society in securing appropriate justice for criminal offences⁵⁸. Additionally, the right protects individual from suffering apprehension for long time, and from 'extra judicial punishments.'⁵⁹ Besides, it also maintains fairness.

Long time incarceration of the defendant highly curtails her/his ability to defend her/his claims by losing access to defense evidence and witnesses. The longer the trial lasts the likelihood to get material evidence and witnesses diminish along worryingly.

However, the risk of delay is not a threat only poised against defendants. Both prosecutor and the defendants are under the danger of losing evidence in this way. However, the risk of delay will affect the defendant worse than the prosecutor because, it is 'the defendant's rights (that are) under determination before the court of law'.⁶⁰ Therefore, the guarantee of right to speedy trial safeguards defendant's and society's interests from long trial as its fundamental purpose.

⁵⁷ F. D. L. Jr, The Lagging Right to a Speedy Trial: Source: Virginia Law Review, Vol. 51, No. 8 (Dec., 1965),p 1587-1620 Published by: Virginia Law Review Stable URL: <http://www.jstor.org/stable/1071650> Accessed: 13/03/2009 09:25, page 1592.

⁵⁸ Tinsley, Jimmie E., Prejudice Resulting from Unreasonable Delay in Trial, , J.D. American Jurisprudence Proof of Facts 2d, Database updated July 2008

⁵⁹ Extra judicial punishment in this sense is used to explain accusation of the defendant by the public and any kind of social disfavor towards the accused.

⁶⁰ Herman, Susan N, The Right to a Speedy and Public Trial: A Reference Guide to the United States Constitution, , Greenwood Publishing Group, 2006

After understanding the protection of the right and its purposes, we will now focus on the beneficiary of the right. The Sixth Amendment refers the accused to enjoy the rights recognized in the Amendment⁶¹. According to the amendment the person who is an accused shall enjoy the rights mentioned in the article, including the right to be tried by jury and speedy and public trial.

If all these protections benefit the accused, question arises who and when a person can be considered an accused entitled to claim speedy trial. A person is an accused when s/he is suspected of criminal activity, which occurs, when an indictment is filed against her/him, or when the person is actually arrested after being charged.⁶² An accused person therefore has the procedural guarantees in the Sixth Amendment and speedy trial protections in other sources. The Supreme Court correspondingly concluded in *United States v. Marion* that speedy trial provision of the Sixth Amendment is applicable when a person becomes an accused, which is either being arrested after charge brought against him or indicted⁶³.

Before concluding the discussion on speedy trial right and its protections in a legal system, finally we have to see the remedies available for courts if a violation occurs to right to speedy trial. The Supreme Court of the United States in different cases identified the appropriate remedy for the violation and according to the court the proper remedy is

⁶¹ VI Amendment, '[I]n a criminal prosecution an *accused* shall enjoy the right the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

⁶² Tinsley, Jimmie E., *Prejudice Resulting from Unreasonable Delay in Trial*, , J.D. American Jurisprudence Proof of Facts 2d, Database updated July 2008

⁶³ *United States v. Marion*, 404 U. S. 307 (1971), paragraph

dismissal of the indictment.⁶⁴ This remedy might be regarded as drastic and could invoke reasonable debate on its proportionality. Even though the Supreme Court recognized how extreme the remedy is, it is now a settled matter that dismissal is the only possible remedy, where the Federal constitutional provision of right to speedy trial has been violated.⁶⁵

Such pro-right jurisprudence of the Supreme Court is not conditional to limitation of time. Speedy trial guarantees in the American legal system, especially the constitutional Amendment does not provide any time limit⁶⁶ concerning the protection of the right⁶⁷. The court considers only the specific facts of each case to decide protection and/or violation of speedy trial.⁶⁸ In determining whether or not the accused has been deprived of the Federal Constitutional right to a speedy trial, the court approaches cases on ad-hoc basis and applies a test, often referred to as the Barker test or balancing interest test⁶⁹. The application of the test will allow the court to decide whether speedy trial right is violated or not. If the court actually finds violation, the remedy for the violation will be dismissal of the indictment or the charge against the accused. To understand the Barker test and the

⁶⁴ Wernikoff, M. Steven, Sixth Amendment-Extending Sixth Amendment Speedy Trial Protection to Defendants Unaware of their, *The Journal of Criminal Law & Criminology*, Vol. 83, No. 4 Copyright, 1993 by Northwestern University, School of Law Printed in U.S.A.

⁶⁵ *Strunk v United States*, 412 US 434, 37 L Ed 2d 56, 93 S Ct 2260

⁶⁶ The time limitation here is defined as the amount of delay one has to wait before bringing a speedy trial right claim to the court.

⁶⁷ Francis C. Amendola, et al. Time of trial; Right to speedy trial, B. Constitutional Guaranty of Speedy Trial, *Corpus Juris Secundum*, Database update June 2008 and *Doggett v. United States*, 112 S. Ct. 2686, 2690 (1992).

⁶⁸ *Ibid*

⁶⁹ *Ibid*, the balancing interest test is devised by the Supreme Court of the United States in the case *Barker v. Wingo*, 407 U.S. 514 (1972), 'A defendant's constitutional right to a speedy trial cannot be established by any inflexible rule, but can be determined only on an *ad hoc* balancing basis in which the conduct of the prosecution and that of the defendant are weighed. The court should assess such factors as the length of and reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.'

ways the US courts apply the elements of the test to particular facts a fair depth of discussion is in order in the next section.

Balancing Interest Test

The Sixth Amendment of the United States constitution provides speedy trial right of an accused. However, the constitution and the specific Amendment do not state any specific amount of delay in time to trigger claims by the accused on the right. There is no constitutional time guideline on how speedily a criminal case should be dealt with and one cannot automatically decide the existence of violation merely because a certain time elapses. Because of this, the courts can only review all available factual circumstances of the case on case by case basis to pass their judgment on speedy trial claim.

To resolve this situation, 'the Supreme Court articulated a four-part test for reviewing the facts of each case in determining whether post-accusation delay violates the Speedy Trial Clause.'⁷⁰ The Supreme Court developed a test, which has four specific parts in its decision in *Barker v. Wingo* case and used it to review all facts in the case to determine whether post accusation delay violates the right to speedy trial⁷¹. The elements formulated by the court in the case are: 1) the length of the delay, 2) The reason for the delay, 3) whether the defendant promptly ascertained the rights (assertion of right) and 4) the amount of prejudice suffered by the defendant.⁷² The consideration of circumstances in a particular case by these elements of the test will allow the court to properly decide on speedy trial right claim.

⁷⁰ Wernikoff, M. Steven, Sixth Amendment-Extending Sixth Amendment Speedy Trial Protection to Defendants Unaware of their, *The Journal of Criminal Law & Criminology*, Vol. 83, No. 4 Copyright, 1993 by Northwestern University, School of Law Printed in U.S.A, page 806.

⁷¹ Wernikoff, M. Steven, Sixth Amendment-Extending Sixth Amendment Speedy Trial Protection to Defendants Unaware of their, *The Journal of Criminal Law & Criminology*, Vol. 83, No. 4 Copyright, 1993 by Northwestern University, School of Law Printed in U.S.A, page 806,

⁷² *Barker v. Wingo*, 407 U.S. 514 (1972)

The test is usually referred to as the Barker test or the balancing interest test, because according to the court the test does not simply review individual interests of defendants, but it also consider the interests of the society in defending itself from crime⁷³. Speedy trial protects the interests of the society in the efficient administration of justice; if criminal cases are not tried promptly and speedily, society may suffer in various ways, for instances defendants may negotiate plea for lesser crime, they may be free on bail for lengthy period with an opportunity to commit other crimes or to jump bail.⁷⁴

In order to see the application of the specific elements of the test by courts let us see how the United States Supreme Court handled the application of the test in the following section.

2.3.1. The Length of Delay

The first element of the Barker test is the length of the delay. Persons who are either indicted or charged with the possibility of bail are not are the accused who shall benefit from the speedy trial right protection. The time consideration for delay shall run from the moment the accused is being indicted or charged till the time s/he receives decision on his case. ‘While the length of delay permissible under the Sixth Amendment cannot be quantified’⁷⁵ courts in the application of the right consider the delay with regard to the circumstances of the case. According to the Barker court ‘the length of delay is generally considered a triggering mechanism, with the reasonableness of a period of delay

⁷³ Barker v. Wingo, 407 U.S. 514 (1972)

⁷⁴ Tinsley, Jimmie E., Prejudice Resulting from Unreasonable Delay in Trial, , J.D. American Jurisprudence Proof of Facts 2d, Database updated July 2008

⁷⁵ Herman, Susan N, The Right to a Speedy and Public Trial: A Reference Guide to the United States Constitution, Greenwood Publishing Group, 2006.

necessarily is dependent on the circumstances of the case'.⁷⁶ The court shall only apply the Barker test if it considers that the delay could be preemptively prejudicial to the defendant's case⁷⁷.

The duration of the delay for any case is a fundamental factor to be considered by the court, because of the prejudice it causes to the defendants and to the society itself. The prejudice aspect of the delay is directly related to the purposes the speedy trial vowed to protect, but even in this aspect itself there is no time limit the court should follow. However, the Supreme Court of the United States in *Doggett v. United States*⁷⁸ case decided that uncommon delay is prejudicial for the defendant case and because of this it would be impossible for the defendant to properly defend himself. The court decided that prejudice intensifies over time⁷⁹ if a decision is not given in due time serving the interests of the defendant and the society. According to Justice Souter, who wrote the court's opinion, excessive delay compromises the reliability of a trial in ways a defendant cannot prove⁸⁰. The reliability of the case as mentioned in the decision according to Wernikoff⁸¹ includes loss of memory by the witness and losing of evidence which are important for the defendant's case.

For persons who are charged with offences which prohibit bail, the prospect of not having their cases decided speedily opens a door for them to languish in prison for so long

⁷⁶ Herman, Susan N, *The Right to a Speedy and Public Trial: A Reference Guide to the United States Constitution*, Greenwood Publishing Group, 2006, *Barker v. Wingo*, 407 U.S. 514 (1972)

⁷⁷ Wernikoff, M. Steven, *Sixth Amendment-Extending Sixth Amendment Speedy Trial Protection to Defendants Unaware of their*, *The Journal of Criminal Law & Criminology*, Vol. 83, No. 4 Copyright, 1993 by Northwestern University, School of Law Printed in U.S.A., page 811.

⁷⁸ *Doggett v. United States*, 112 S. Ct. 2686 (1992)

⁷⁹ *Ibid*

⁸⁰ *Doggett v. United States*, 112 S. Ct. 2686 (1992)

⁸¹ Wernikoff, M. Steven, *Sixth Amendment-Extending Sixth Amendment Speedy Trial Protection to Defendants Unaware of their*, *The Journal of Criminal Law & Criminology*, Vol. 83, No. 4 Copyright, 1993 by Northwestern University, School of Law Printed in U.S.A., page 812

without being convicted of the crime they are charged with. As we saw in the previous section, one of the purposes of speedy trial right is to curb this possibility of long term imprisonment without conviction. In general, delay of trial exacerbates loss of evidence and loss of memory affecting the fairness of the case causing possible violation of rights. But even in these circumstances, there is no fixed time to determine one case as speedy or delayed. It, nevertheless all depends on the circumstances of the case which follows the reason of the delay.

2.3.2. The Reason(s) for Delay

Undue delay affects the fairness of the case through different ways and speedy trial right protects this violation. But the question is which delays can be considered to be undue or unreasonable. This probe is resolved by the second element of the test which evaluates the reasons of the delay. The court basically in this element tries to identify the reasons for the delay and the responsible party for the delay. The progress of the criminal proceeding shall be evaluated by the proper execution of the prosecution through the activities of the public prosecutor and other state institutions one side and the defendant on the other.

The function of public prosecutor is to press a public complaint in the name of the state or the society, the right of prosecution in criminal matters (lies) solely in the hands of the public prosecutor⁸². The society' interests in the criminal prosecution shall subsequently be represented through the works of public prosecutor and the public prosecutors is expected to achieve efficient administration of justice through prosecuting criminals

⁸² Jescheck, Hans-Heinrich, The Discretionary Powers of the Prosecuting Attorney in West Germany, Source: The American Journal of Comparative Law, Vol. 18, No. 3 (Summer, 1970), pp. 508-517
Published by: American Society of Comparative Law Stable URL: <http://www.jstor.org/stable/839342>
Accessed: 19/03/2009 10:23, page 510.

speedily. The second element of the Barker test is the reason for the delay; in this element the court shall first examine the sources of the delay and the reasons for the delays.

‘It is uniformly agreed that delays attributable to the defendant do not violate the right to a speedy trial.’⁸³ Delays by the defense or his attempt to escape from the jurisdiction and other acts on his account can not avail him/her dismissal of the indictment or the charge.

Generally, the delay must have been caused by the prosecution without good cause⁸⁴ and intentional delay by the prosecutor to hamper the defense shall be considered heavily against the prosecution⁸⁵. The complexity of cases and neutral causes which can be consider as good causes for delay, including the overcrowding of cases in courts are problematic to solve. ‘[I]t has been stated that since such neutral reasons are the responsibility of the government rather than the defendant, they should be considered for the benefit of the defendant, but should not be weighed as heavily in favor of dismissal as are deliberate delays caused by the prosecution without good reason’⁸⁶.

The Supreme Court decided in the Barker and Doggett cases that the reason for the delay for effective speedy trial claim should be attributed to the prosecutor and not to the defendant. The failure of the prosecutor to bring the prosecution in timely manner

⁸³ Herman, Susan N, *The Right to a Speedy and Public Trial: A Reference Guide to the United States Constitution*, Greenwood Publishing Group, 2006 and see also Tinsley, Jimmie E., *Prejudice Resulting from Unreasonable Delay in Trial*, , J.D. American Jurisprudence Proof of Facts 2d, Database updated July 2008

⁸⁴ Herman, Susan N, *The Right to a Speedy and Public Trial: A Reference Guide to the United States Constitution*, Greenwood Publishing Group, 2006, good cause for the delay is considered with the complexity of the case and the actions of the prosecutor to deal with the case at hand without any negligence on their part.

⁸⁵ Uviller, H. Richard, *Barker v. Wingo: Speedy Trial Gets a Fast Shuffle*, *Columbia Law Review*, Vol. 72, No. 8 (Dec., 1972), pp. 1376-1402, Published by: Columbia Law Review Association, Inc. Stable URL: <http://www.jstor.org/stable/1121490> Accessed: 19/03/2009 11:56, page 1392.

⁸⁶ Tinsley, Jimmie E., *Prejudice Resulting from Unreasonable Delay in Trial*, , J.D. American Jurisprudence Proof of Facts 2d, Database updated July 2008 and see also *Barker v. Wingo*, 407 U.S. 514 (1972)

including bringing evidences and witnesses on its behalf should be one of the reasons for the delay in order for the defendant to secure relief based on speedy trial claim.

Public prosecution with all its function in prosecuting criminals owed obligations and responsibilities to the society, but it also has obligation to respect the rights of the defendant. The specific functions and activities of the prosecutor might be different between jurisdictions to jurisdiction. However, the extent of the responsibilities of public prosecutor in the US as identified by the *Barker v. Wingo* court is due diligent⁸⁷. The court did not for that matter provide specific elements as to the due diligent responsibility, but according to the spirit of the decision it obligates prosecutors' to take all reasonable steps to respect the rights of defendants through prosecuting their case in speedy manner. Failure of this responsibility by the prosecutor can be a confirmation for courts to ascertain the sources of the delay.

2.3.3. Assertion of Right

The defendant's assertion or non-assertion of his right to a speedy trial is closely connected with the issue of waiver⁸⁸. The traditional doctrine on waiver was a demand doctrine⁸⁹. According to the doctrine, if the defendant failed to demand his speedy trial right, s/he forfeits the privilege to benefit from speedy trial protection. The *Barker* court in regard to waiver decided that waiver is an "intentional relinquishment or abandonment of a known right or privilege". For this reason, the court refused to infer waiver from

⁸⁷ *Barker v. Wingo*, 407 U.S. 514 (1972)

⁸⁸ Tinsley, Jimmie E., *Prejudice Resulting from Unreasonable Delay in Trial*, J.D. American Jurisprudence Proof of Facts 2d, Database updated July 2008

⁸⁹ *Ibid*

silence or simply from inaction. The Barker court emphasized "that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."⁹⁰

The defendant's failure to seek a speedy trial is one factor to be considered in the inquiry concerning an alleged deprivation of the constitutional right. In criminal prosecution state and the public prosecutor have primary responsibility to prosecute the accused, though, the defendant does have some "responsibility to assert his right" after all⁹¹. Finally the court decided that defendant's failure to bring the motion for dismissal based on delay shall be weighed 'heavily against the defendant's subsequent claim of deprivation'⁹²,

2.3.4. The amount of prejudice suffered by the defendant

The prejudice suffered by the defendant in lieu of the delay is an important element that obtains thorough consideration by the court in a speedy trial right claim. After all the protected interests we identified above instigate protection since the right is deemed to protect them aptly. The barker court in the case considers three interests that could potentially suffer because of the delay in the trial which the speedy trial shall protect. According to the court speedy trial shall (1) prevent oppressive pretrial incarceration; (2) minimize anxiety endured beneath the cloud of an unresolved accusation; and (3) limit the possibility of impairment of the defense⁹³. Impairment of the defendant's defense is considered the greatest concern by the court, because the longer time the case takes the higher the risk for the defendant to find and substantiate his defense. Consequently delay prejudicially affects all the interests mentioned above severely.

⁹⁰ Tinsley, Jimmie E., Prejudice Resulting from Unreasonable Delay in Trial, , J.D. American Jurisprudence Proof of Facts 2d, Database updated July 2008

⁹¹ Ibid

⁹² Barker v. Wingo, 407 U.S. 514 (1972)

⁹³ Tinsley, Jimmie E., Prejudice Resulting from Unreasonable Delay in Trial, , J.D. American Jurisprudence Proof of Facts 2d, Database updated July 2008

There are actually three different types of prejudices against the interests of the defendants. Prejudice suffered by the defendant can be implicit, presumptive or manifested.⁹⁴

The first prejudice is implicit prejudice. Prejudice is always implicit in the denial of a right so close to justice⁹⁵. The constitutional rights recognized to serve certain interests including justice implicitly suffer prejudice when the enforcement is denied. The bargaining court commits on the enforcement or limitation of each right prejudices right in implicit ways. Most rights are indeed of this kind. Several sixth amendment protections are imbued with such consanguinity to justice that denial is deemed inherently prejudicial.⁹⁶

Presumptive prejudice is though is not quite implicit, but its likelihood is so great that it is strongly presumed.⁹⁷ Presumptive prejudice is much more bold than implicit prejudice in a way that there could be threats that can be considered for prejudice in the process. Excessive delay in trial is a good example for presumptive prejudice that the court presumes prejudice because of long time delay for trial as mentioned above will diminish reliability of cases through time.⁹⁸

⁹⁴ Tinsley, Jimmie E., Prejudice Resulting from Unreasonable Delay in Trial, , J.D. American Jurisprudence Proof of Facts 2d, Database updated July 2008

⁹⁵ Ibid

⁹⁶ Ibid

⁹⁷ Tinsley, Jimmie E., Prejudice Resulting from Unreasonable Delay in Trial, , J.D. American Jurisprudence Proof of Facts 2d, Database updated July 2008

⁹⁸ Wernikoff, M. Steven, Sixth Amendment-Extending Sixth Amendment Speedy Trial Protection to Defendants Unaware of their, The Journal of Criminal Law & Criminology, Vol. 83, No. 4 Copyright, 1993 by Northwestern University, School of Law Printed in U.S.A, page 813.

The third prejudice is manifested prejudice. According to the Barker court manifested prejudice requires the defendant to show actual prejudice due to the trial's misconduct.⁹⁹ Manifested prejudice requires the defendant to show particular prejudice due to delay. Justice Powell who wrote the opinion of the court in Barker recognized that the prejudice could be manifested on the defense through losing of evidences and witnesses due to lengthy of delay¹⁰⁰. In this prejudice the defendant is required to show specific prejudice he has suffered¹⁰¹.

However, Supreme Court's practice about the party who has the burden to show the existence of the prejudice does sometimes shift from the defendant to the state in certain instances. In the *Commonwealth v. Clark*¹⁰² case the court held that where there has been a substantial delay and when defendant makes a prima facie case showing of resultant harm, the burden of proof lies on the state to show the absence of prejudice.

Additionally, the inability of the defendant to show specific prejudice on the above named interests did not defeat his claim of speedy trial right. The majority decision in *Doggett* rather reasoned that extraordinary delay in the case already compromised the reliability of the case even in an unidentified ways¹⁰³ which basically does not be

⁹⁹ Tinsley, Jimmie E., *Prejudice Resulting from Unreasonable Delay in Trial*, J.D. American Jurisprudence Proof of Facts 2d, Database updated July 2008

¹⁰⁰ *Barker v. Wingo*, 407 U.S. 514 (1972)

¹⁰¹ One of the specific prejudices on the defendant due to long time imprisonment or delay of justice is violation of the right for presumption of innocent, since imprisonment without convictions a violation of presumption of innocence, see also Tinsley, Jimmie E., *Prejudice Resulting from Unreasonable Delay in Trial*, J.D. American Jurisprudence Proof of Facts 2d, Database updated July 2008.

¹⁰² *Commonwealth v. Clark*¹⁰², 443 Pa. 318, 279 A.2d 41 (1971), see also Wernikoff, M. Steven, *Sixth Amendment-Extending Sixth Amendment Speedy Trial Protection to Defendants Unaware of their*, *The Journal of Criminal Law & Criminology*, Vol. 83, No. 4 Copyright, 1993 by Northwestern University, School of Law Printed in U.S.A page 805, and see also *Doggett v. United States*, 112 S. Ct. 2686, (1992).

¹⁰³ Wernikoff, M. Steven, *Sixth Amendment-Extending Sixth Amendment Speedy Trial Protection to Defendants Unaware of their*, *The Journal of Criminal Law & Criminology*, Vol. 83, No. 4 Copyright, 1993 by Northwestern University, School of Law Printed in U.S.A page 813, and see also *Doggett v. United States*, 112 S. Ct. 2686, (1992).

defeated even when the defendant did not show it. The reason for this kindness by the court is due to the proper understanding of the difficulty to prove prejudice¹⁰⁴.

As I mentioned above speedy trial right in the United States legal system is a protection for an accused that is either indicted or charged. This right, which protects individual from long term imprisonment before conviction, is also used to minimize anguish that will be caused due to the criminal system being moved against the person. Therefore, this protection in a way assumes to protect the liberty interests of the person and defends also the liberty of the person from potential trouble from the society surrounding the person.

Speedy trial right is a fundamental liberty right,¹⁰⁵ with a primary importance to the legal system through which individuals could challenge incarceration without conviction while waiting for their trial. The liberty interests of the right defends undue exposure for anxiety on the part of the accused, protects disruption of civic life, work and family affairs due to the delay of trial after the indictment. Justice Thomas in his dissenting opinion in *Doggett v. United States*, argued that the ‘speedy trial is a protection of liberty’ which only extends to situation where the liberty interests are infringed by imprisonment for so long before conviction or the threat imposed by the indictment through the delays of the case.¹⁰⁶

The liberty interest of speedy trial being the weight lifter on one side of criminal prosecution, the interest of the society holds the other side of the equilibrium. The society has due interests

¹⁰⁴ Tinsley, Jimmie E., Prejudice Resulting from Unreasonable Delay in Trial, , J.D. American Jurisprudence Proof of Facts 2d, Database updated July 2008

¹⁰⁵ Wernikoff, M. Steven, Sixth Amendment-Extending Sixth Amendment Speedy Trial Protection to Defendants Unaware of their, *The Journal of Criminal Law & Criminology*, Vol. 83, No. 4 Copyright, 1993 by Northwestern University, School of Law Printed in U.S.A. and see also *Doggett v. United States*, 112 S. Ct. 2686, (1992), page 816.

¹⁰⁶ *Doggett v. United States*, 112 S. Ct. 2686, (1992).

in bringing prompt criminal proceedings, however, ‘no mathematical formula exists with respect to the weighing and balancing process performed when analyzing a speedy trial claim.’¹⁰⁷ Therefore, in any speedy trial claims the court should review the above interests through the balancing interest test using the four elements explained below.

¹⁰⁷ Tinsley, Jimmie E., Prejudice Resulting from Unreasonable Delay in Trial, , J.D. American Jurisprudence Proof of Facts 2d, Database updated July 2008

Chapter Three

Genocide Trial Elsewhere

Genocide crime is one of the worst and terrible offence human beings could commit against other fellow humans. It is one of the most horrible experiences for countries and people that have shared a glimpse of the evil in others. 'It is the first and greatest of the crimes against humanity both because of its scale and the intent behind it: the destruction of a group'.¹⁰⁸

The evil of genocide is not still redeemed from happening again and again in the world, it is happening with much more cruelty and expediency. The promise vowed by the United Nations 'to never let it happen again'¹⁰⁹ remained as an empty promise if one reviews the history of genocide: the holocaust, Armenia genocide, genocide in Former Yugoslavia, genocide in Rwanda, Ethiopia, Sierra Leone, Darfur, Cambodia, Argentina, Guatemala, Chili and others are enough examples.

Winston Churchill pointed out that the only thing humans learn from history is that they never learned from history¹¹⁰. It is a well said observation which requires no explanation for one who reviews the history of genocide in the last 50 years.

Etymologically the word genocide was first coined by a Polish-Jewish lawyer named Raphael Lemkin (1900-1959)¹¹¹ when he tried to describe the killing of Jewish in Europe by Nazi German before and during the Second World War. The term was never heard of

¹⁰⁸ Destexhe, Alain, The Third Genocide Source: Foreign Policy, No. 97 (Winter, 1994-1995), Published by: Carnegie Endowment for International Peace

¹⁰⁹ This is the promise the international community made when they signed the convention against crimes of genocide in 1948.

¹¹⁰ The common phrase was taken from Winston Churchill's famous quote about history with regard to the fate of the world witnessing two world wars in just short period of time.

¹¹¹ Destexhe, Alain, The Third Genocide Source: Foreign Policy, No. 97 (Winter, 1994-1995), Published by: Carnegie Endowment for International Peace

before Lemkin used it in 1944. The term *geno* is a Greek word meaning race or ethnic and *cide* is the Latin term for killing. The term genocide was used in the indictment at the Nuremberg trial against Nazi officials to describe one of the charges in the trial, crimes against humanity. United Nations On December 9, 1948 adopted the Convention for the Prevention of and Punishment of Genocide establishing crimes of genocide as an international crime¹¹².

This convention obligated state parties to prohibit and punish crimes of genocide regardless of the time it was committed whether it was during peace time or war¹¹³.

Crime of genocide in the convention is defined as;

Article 2) In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Countries which are party to the convention are under obligation to punish perpetrators of genocide which also includes criminalization of the act in the domestic system. Article 5 provides that parties to the convention should enact appropriate laws in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty

¹¹² Convention on the Prevention and Punishment of the Crime of Genocide Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948 *entry into force* 12 January 1951, in accordance with article XIII

¹¹³ Article 1 of the convention

of genocide or any of the other acts enumerated in article 3¹¹⁴. Currently the two international criminal tribunals established by Security Council¹¹⁵ for Former Yugoslavia and for Rwanda have the mandate to hear crimes of genocide as one of their jurisdiction. The Nuremberg trial however, was set up before the convention was signed, which means that the Nazi officials were not charged with crimes of genocide as we know it today. What is worse about Armenian genocide is that Turkey, which is responsible for the killings, has not yet officially condemned the massacre and mass deportation of Armenians by “Young Turks” of the Ottoman Empire in 1915-16¹¹⁶. The other genocides known to be committed or have provoked prosecution, either by national courts, by foreign countries¹¹⁷ or by special (ad hoc)¹¹⁸ international tribunals set up to prosecute suspects of the crime.

The objective of this chapter is to examine a few of the ‘famous’ genocide trials in the world and to see how complex it is to prosecute crimes of genocide by national courts and even by international tribunals in order to understand better the Ethiopian experience in such endeavor. To start the description first, let us focus firstly on the Nuremberg trial which is the first and one of the most reported and studied genocide trial in the world.

¹¹⁴ Article III of the convention provides that: The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

¹¹⁵ International criminal tribunal for the former Yugoslavia and for Rwanda, article 4 of ICTY statute and article 2 of ICTR

¹¹⁶ Destexhe, Alain, *The Third Genocide Source: Foreign Policy*, No. 97 (Winter, 1994-1995), Published by: Carnegie Endowment for International Peace

¹¹⁷ Augusto Pinchot was prosecuted in Spain and Ricardo Cavallo was extradited by Mexico to Spain to be charged for genocide which was committed in Argentina (former Argentinean Navy officer) *The New York Times*, February 3, 2001

¹¹⁸ Special court of Sierra Leone was established jointly by the government of Sierra Leone and the UN in 2002, following the UN brokered Lome peace Accord of the 1999 at the end of the 10 year civil war.

3.1 The Nuremberg trials

The Nuremberg trial is an international criminal trial set up to prosecute Nazi officials at the city of Nuremberg, Germany from 1945 till 1949 by the winning forces of the Second World War. The allied forces, USA, UK, France and USSR signed the Charter of International Military Tribunal¹¹⁹ which established the rules and procedures of the trial and subsequently the winners appointed one presiding and alternate judges each for the trial¹²⁰. US Supreme Court associate Justice Jackson became American chief prosecutor¹²¹ and Sir Geoffrey Lawrence of Britain assumed the position of Chief Judge¹²².

The Nuremberg trial had twelve trials which were divided based on the specific criminal acts of the defendants captured by the allied forces¹²³. Out of the twelve trials the first trial can be considered to have received too much attention because of the status of the defendants. In this trial, 21 top Nazi officials including Hermann Goering¹²⁴ and Rudolph Hess who was the deputy Fuehrer until 1941 were prosecuted. Another trial was the Justice (Judges) trial, where 7 Nazi judges and 9 members of the Reich Ministry of justice were prosecuted 'for using their power as prosecutors and judges to commit war crimes and crimes against humanity'¹²⁵. Yet another trial was the the Doctors' trial, where Nazi physicians were prosecuted for conducting inhuman experiments on German

¹¹⁹ August 8, 1945 the allied power signed the Charter of International Military Tribunal

¹²⁰ Article 2 of the charter of international military tribunal

¹²¹ Ferencz, Benjamin B. Inside the Nuremberg Trial: A Prosecutor's Comprehensive Account. by Drexel A. Sprecher Source: The American Journal of International Law, Vol. 93, No. 3 (Jul., 1999), pp. 760-761 Published by: American Society of International Law, page 760

¹²² Official site set up for Nuremberg trial

<http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/nuremberg.htm>, visited on march 25, 2009

¹²³ Ibid

¹²⁴ Air Force Chief; President of Reichstag; Director of "Four Year Plan" of Nazi Germany.

¹²⁵ United States of America v. Alstötter et al. ("The Justice Case") 3 T.W.C. 1 (1948), 6 L.R.T.W.C. 1 (1948), 14 Ann. Dig. 278 (1948).

civilians and nationals of other countries¹²⁶ (one of the defendants in the case was Karl Brandt who was the personal doctor of Adolf Hitler himself).

The Nazi officials in the first trial were charged with one or more from the four charges brought against them. These charges were, 1. Conspiracy to wage war, 2) waging war or crimes against peace, 3) war crimes and finally 4) crimes against humanity. They were charged for the mass killing of millions of Jews, ethnic minorities, physically and mentally disabled, civilians in occupied countries and killing of Jews in concentrations camps¹²⁷. The term genocide was used to describe crimes against humanity.

The Allied forces contributed hugely to the trial starting from assigning judges and providing supporting staff for the tribunals. The number of staffs put together for the entire job was more than 900 and United States alone contributed 600 staffs for the tribunal to do all necessary research and investigation for the prosecution¹²⁸. Just after the war the Allied forces arrested close to 100,000 suspects of war crimes and crimes against humanity. The prosecution team had to investigate this large number of suspects together with conducting interviews, collecting evidence and identifying material witnesses to bring the people who committed the heinous crime during and before the Second World War. All of these experts from different countries however, sadly managed to prosecute a little over hundred defendants¹²⁹.

Nevertheless 'in the 1950s and 1960s, the German judge and prosecutor Fritz Bauer estimated there were 100,000 Germans who were responsible in one way or another for

¹²⁶ Nuremberg indictment for the doctors case, see Official site set up for Nuremberg trial <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/nuremberg.htm>, visited on march 25, 2009

¹²⁷ Charges brought against the 21 Nazi officials at Nuremberg,

¹²⁸ Official site set up for Nuremberg trial <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/nuremberg.htm>, visited on march 25, 2009

¹²⁹ Ibid

mass killings of Jews. According to other estimates the numbers even becomes as many as 300,000.¹³⁰

After the Nuremberg trial the allied forces lost themselves in building up their political blocks during the cold war and lost interest in prosecuting Nazis in 1953¹³¹. According to Bauer there were less than 5000 people who were prosecuted at the time¹³². One of the reasons for such failure to prosecute everybody who was involved in the act is partly due to the complex nature of crime of genocide, especially if it has been committed on a wide scale and for so long as it was with the Nazi's in their 'Final Solution' policy against the Jews. To give analytical facts about the complexity of genocide trial from Nuremberg trial, let us at least take the Doctors' trial which was first started on December 9, 1946 till August 20 1947. In this trial the tribunal heard 85 of witnesses and investigated 1500 pieces of evidence before it passed verdicts against the defendants¹³³.

In conclusion the Nuremberg trial can be considered the first genocide trial in the world, but it also duly received a lot of criticism. Most of the critics of the trial were focused on the due process rights of the defendants and on the *ex post* fact laws of the trial because the laws for the tribunal were adopted after the commission of the act defeating the basic concept of principle of legality in criminal laws¹³⁴. But even in such circumstances the Nuremberg trial shows the difficulty in prosecuting genocide crimes even with the support of the world leaders.

¹³⁰ BBC News article titled, The hunt for the last Nazis, <http://news.bbc.co.uk/2/hi/7857753.stm>, brief news reported by the BBC.

¹³¹ Ibid

¹³² Ibid

¹³³ Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946–April 1949.

¹³⁴ The crimes were defined in the Charter of the International Military Tribunal which was signed on august 8, 1945

3.2 Rwandan genocide trials

One of the worst genocides in the history of 20th century Africa is most definitely the Rwandan genocide. 'The Hutu militias...supporting the Rwandan government, spear headed a systematic slaughter of the minority Tutsi, who comprised around 14 per cent of the population¹³⁵. From the history of genocide the Rwanda genocide could be the most expedient and nevertheless deadly ones which cost a large number of lives. It is estimated that at least half a million Tutsis were killed over a 10- week period¹³⁶. But the United Nations official number of victims within hundred days of the genocide is 800,000 people¹³⁷, this number is also backed by Organization of African Union (OAU)¹³⁸ and United States' State Department¹³⁹.

The Rwandan genocide is the true convenient example of what Winston Churchill spoke about. It is a horrible international crime that annihilated a population between '6 and 11 per cent of the whole Rwandan population and more than half of Rwanda's Tutsi population within a two month period.'¹⁴⁰ It is a genocide that was carried out with swift planning and precision aiming to eliminate the minority Tutsi from Rwanda in a similar plan as the Nazi's plan of the 'Final Solution' for Jews, 'far from being a spontaneous

¹³⁵ Destexhe, Alain, The Third Genocide Source: Foreign Policy, No. 97 (Winter, 1994-1995), Published by: Carnegie Endowment for International Peace.

¹³⁶ Ibid

¹³⁷ <http://www.un.org/apps/news/storyAr.asp?NewsID=10344&Cr=rwanda&Cr1>, visited March 28, 2009

¹³⁸ International panel of eminent personalities set up to investigate the Rwandan genocide by OAU in 1998 affirmed the number of victims in their report entitled Rwanda: The Preventable Genocide International panel of eminent personalities

¹³⁹ <http://www.state.gov/r/pa/ei/bgn/2861.htm>, visited March 28, 2009

¹⁴⁰ Destexhe, Alain, The Third Genocide Source: Foreign Policy, No. 97 (Winter, 1994-1995), Published by: Carnegie Endowment for International Peace.

atrocities, the 1994 Rwandan genocide was premeditated, meticulously planned and systematically perpetrated'¹⁴¹.

When the Hutu backed government lost the civil war RPF (Rwandan Patriotic Front) took the power and started to imprison individuals who were suspected of being involved in the genocide. According to Jeremy Sarkin¹⁴² the government arrested 120, 000 Hutu suspects for the atrocities.

The choice that Rwandan government has made to deal with the past is justice, to prosecute those accused of involvement in the genocide as the focal point of government policy¹⁴³. In order to fulfill this policy the government devised a strategy to classify perpetrators of the crime into different categories. The policy creates 4 different categories of crime as identified and developed by the organic law came out in 1996¹⁴⁴. The first category of crime was for those people who were involved in conspiring, planning and instigating the act in a position of authority within the military or the civil infrastructure and those who actually commit the actual killing¹⁴⁵. The second category covered people who are not in the first category and who had committed murder or serious crimes against the person that led to death. The third category is other serious

¹⁴¹ Melvern, Linda, the past is prologue: planning the 1994 Rwandan genocide, article published in After Genocide, transitional justice, post conflict reconstruction and reconciliation in Rwanda and beyond, edited by Phil Clark and Zachary D. Kaufman, page 31, published Hurst and company, London, 2008

¹⁴² Sarkin, Jeremy, the tension between Justice and reconciliation in Rwanda: politics, human rights, due process and the role of the Gacaca court in dealing with genocide, journal of African law, vol. 45, no. 2 (2001), page 143-172, Cambridge university press on behalf of the school of Oriental and African studies.

¹⁴³ Ibid, page 146

¹⁴⁴ Republic of Rwanda, "loi organique no. 8196 du 30/8/96 sur l'organisation des poursuites des infractions constitutives du crime de genocide ou de crimes contre l'Humanite, comimise a partir de 1 er octobre 1990" official gazette of the republic of Rwanda(1 September 1996) article 2-9

¹⁴⁵ This category of people charged by the national court overlapped with those over whom the ICTR has attempted to establish jurisdiction. See prosecutor v. Kambanda former (prime minister of the country during the genocide), (case no. ICTR-97-23-s), judgment and sentence, 4 September 1998

crimes against the person and the last category is for people who commit crimes against property¹⁴⁶. The organic law additionally establishes a plea bargaining system¹⁴⁷.

Within such frame work the government requested the Security Council to establish an international tribunal to prosecute people who are responsible for the genocide¹⁴⁸. The Security Council through its resolution¹⁴⁹ set up International Criminal Tribunal for Rwanda to prosecute the people who have committed 'serious breach of international humanitarian law and genocide in the territory of Rwanda and in the neighboring country in the time between January 1994 and December 31, 1994'¹⁵⁰.

The international tribunal has its seat in Arusha, Tanzania¹⁵¹ a place where the Hutu government and the Tutsi rebel had signed a peace deal in 1993. The tribunal so far has prosecuted top officials including the former prime minister, four ministers and one prefect, six Bourgmestres and many others who held a leadership position during the genocide¹⁵².

During the process of the relationship between the Rwanda government and the tribunal became rough¹⁵³, due to this circumstances the government started to put on trial

¹⁴⁶ Sarkin, Jeremy, the tension between Justice and reconciliation in Rwanda: politics, human rights, due process and the role of the Gacaca court in dealing with genocide, journal of African law, vol. 45, no. 2 (2001), page 143-172, Cambridge university press on behalf of the school of Oriental and African studies.

¹⁴⁷ Ibid

¹⁴⁸ The Rwandan government requested the UN to establish a tribunal for the genocide Rwanda by letter dated 28 September, 1994 from the permanent representative of Rwanda to the UN addressed to the president of the security council UN Doc (S/1994/1115),

¹⁴⁹ United Nations Security Council Resolution 955, adopted on November 8, 1994

¹⁵⁰ Statute of International tribunal for Rwandan, Security Council resolution for the establishment of the tribunal, Security Council resolution S/RES/955, 6 November 1994, article 1

¹⁵¹ Arusha peace accord signed between Rwandan government and RPF in Tanzania on august 4, 1993

¹⁵² International Criminal Tribunal for Rwanda, achievements of the ICTR

<http://69.94.11.53/ENGLISH/factsheets/achievements.htm>, visited on March 29, 2009

¹⁵³ The Rwanda government withdrew its support for the tribunal because of the prohibition of capital punishment and because of the possibility of serving sentences outside of Rwanda for the convicted defendants. Rwanda was the only country that voted against the establishment of the tribunal in the

individuals in the domestic courts. These actions by the government was highly criticized by outsiders, because of the long delay in bringing the arrested persons to justice and the overcrowding of prisons¹⁵⁴. The government's response for such backlog of cases was the establishment of traditional court system for handling genocide cases¹⁵⁵.

The Rwandan governments in 2001 'recreate a form of community justice, known as the *Gacaca* trials'¹⁵⁶ through organic law no. 40/2000 of 16 January 2001, "on the establishment of *gacaca* jurisdictions and the organization of prosecutions for offences constituting the crime of genocide or crimes against humanity committed between 1 October 1990 and December 31 of 1994. The *Gacaca* courts shall be used to decrease the burden of the regular court by prosecuting individuals who are charged with least severe crimes.¹⁵⁷ The courts shall be established within the community to deal with crimes of genocide and crimes against humanity with the power to give judgment up to life sentence. This way of adjudication is difficult, considering that 'those doing the adjudication are not legally trained, and no procedural or other rights will be guaranteed'¹⁵⁸. Even after the establishment of the *gacaca* courts in 9000 jurisdictions in the country, the courts were only able to give decisions on 35, 000 genocide suspects

Security Council for the establishment of the tribunal. D. Shnaga and R. Zacklin 'The International Criminal Tribunal for Rwanda, European Journal of International Law, 7/1996

¹⁵⁴ Situation of Human Rights in Rwanda, GA res. 51/114, paragraph 10

¹⁵⁵ Melvern, Linda, *The Past is Prologue: planning the 1994 Rwandan genocide*, article published in *After Genocide, transitional justice, post conflict reconstruction and reconciliation in Rwanda and beyond*, edited by Phil Clark and Zachary D. Kaufman, page 31, published Hurst and company, London, 2008

¹⁵⁶ Lauren Johnson, *Human Rights and Democratic Reform: The Challenge of Reconciliation in South Africa and Rwanda After Apartheid and Genocide*, November 13, 2008, INTS 4501-Comparative Politics in the 21st Century, Dr. Lynn Holland, Autumn 2008

¹⁵⁷ Preamble Draft Organic Law creating "Gacaca Jurisdictions" and Organizing Prosecutions of Offenses that Constitute the Crime of Genocide or Crimes against Humanity Committed between 1 October, 1990 and 31 December, 1994, Draft Organic Law.

¹⁵⁸ Destexhe, Alain, *The Third Genocide Source: Foreign Policy*, No. 97 (Winter, 1994-1995), Published by: Carnegie Endowment for International Peace

which was approximately less than one third of suspects that were imprisoned in the time¹⁵⁹.

This action of the government, however, brought a number of criticisms from the beginning. First the government had arrested a lot of people starting from 1994 and some of them were not prosecuted and stayed there in for more than 7 years¹⁶⁰. The government policy to prosecute large number of people domestically within a weak state structure and low level of human rights record was not much greater than a vision. Reasons for this were that Rwanda's courts lack infrastructure, qualified personnel and funding for their activities. Due process rights have often been absent in violation of both international standards and Rwandan law¹⁶¹ and trials did not even begin in Rwanda until December 1996 which raised questions on the fairness of the trials¹⁶².

The Rwandan judiciary was weak, it has yet to show independence from the executive and it was also widely suspected of bribery and corruption according to United States State Department report of the situation in 2000¹⁶³. All of these issues are contributing factors affecting the fairness of the trial, another big factor to make prosecution of large number of people difficult particularly when judges and magistrate are in any way suspected of corruption.¹⁶⁴ Judges got dismissed, because they passed not guilty verdict

¹⁵⁹ Phil Clark and Zachary D. Kaufman, Introduction and background, After genocide in the book cited above # 27, page 13

¹⁶⁰ Destexhe, Alain, The Third Genocide Source: Foreign Policy, No. 97 (Winter, 1994-1995), Published by: Carnegie Endowment for International Peace, and see also Amnesty International, Rwanda: The Troubled Course of Justice, Report AFR 47/10/00, April

¹⁶¹ Amnesty international report, Rwanda: the Troubled Course of Justice, 26 April 2000.

¹⁶² Destexhe, Alain, The Third Genocide Source: Foreign Policy, No. 97 (Winter, 1994-1995), Published by: Carnegie Endowment for International Peace

¹⁶³ The United States Department of State in its 2000 Country Reports on Human Rights Practices Released by the Bureau of Democracy, Human Rights, and Labor in February 2001. Vol. 45, No. 2 Gacaca Courts in Rwanda 153

¹⁶⁴ Ibid

on genocide charges and some others were removed on false charges of genocide.¹⁶⁵ Additionally, the government's newly appointed judges after the genocide were mainly Tutsi while some Hutu judges were suspended or dismissed¹⁶⁶. All of these political and economic problems in Rwanda created a situation where the rights of defendants were not that much of a priority after the society lost too many people on the hands of Hutu led government and its militias.

Prosecuting suspects of the Rwandan genocide has never been the mission of the Rwandan government alone, United Nations through Security Council resolution already established a tribunal for prosecuting genocide, , some western countries has done their share in prosecuting suspects invoking Universal jurisdiction for the crime. Even with all of these efforts by different stakeholders in the prosecution, there are still some suspects in prisons waiting their turn either to be charged or to be released.

The complexities of prosecuting individuals for crimes of genocide in Rwanda are being much more apparent especially when the national courts and the gacaca trials are concerned. Because first the national courts were even too weak to handle too many cases and they were also incapable to manage complex cases like genocide, and particularly the Gacaca were not competent at all to hear high crimes including genocide and crimes against humanity. Therefore, it seems that defendant's fair trial rights¹⁶⁷ were not

¹⁶⁵ The United States Department of State in its 2000 Country Reports on Human Rights Practices Released by the Bureau of Democracy, Human Rights, and Labor in February 2001. Vol. 45, No. 2 Gacaca Courts in Rwanda

¹⁶⁶ International panel of eminent personalities set up to investigate the Rwandan genocide by OAU in 1998 affirmed the number of victims in their report entitled Rwanda: The Preventable Genocide International panel of eminent personalities, OAU report 18: 38, OAU report 18: 38

¹⁶⁷ According to Amnesty International report in the Gacaca trial the defendants will not be allowed to have representation against international and national protection accorded to defendants by human rights instruments and Rwanda laws. Amnesty International, Rwanda: the Troubled Course of Justice, 26 April 2000.

solemnly respected by the different trials carried out by the national judicial system of Rwanda in the genocide cases. I conclude in this way partially, because of the magnitude of the crimes and also because of the complexity of the crime itself.

Chapter Four

Brief Introduction to Ethiopian Legal System

The objective of this chapter is to see the status and applicability of speedy trial right recognized in international human rights instruments under the Ethiopian legal system. Attempts shall be made in this chapter to portray the status of this particular right through evaluating some general issues surrounding the status of international human rights instruments in Ethiopia. But before rushing into it a brief introduction of the State structure and legal system is important to understand the reality through which Mengistu's genocide case had passed and the significance the test will play in the future. Ethiopia is an African land locked country with a long history of being strong unitary state. The historical account of the country has shown the establishment of long imperial government and a communist¹⁶⁸ state for 17 years between the 1974 and 1991 after the military coup which deposed the last king Haile Selassie I. However, the current government is a federal state since 1995.

Article 1 of the Federal constitution of Ethiopia establishes a federal form of government which followed patterns of people's settlement, language, identity and consent of the people¹⁶⁹. The Ethiopia Federalism is the system established based on ethnic arrangement of the settlers and each ethnic group is empowered to administer its own affairs to the extent of secession¹⁷⁰.

¹⁶⁸ Provisional Military Administration Council which is otherwise known as the Derg deposed King Haile Selassie in 1974 and ruled the country until 1991 adopting communism as the guiding principle of government.

¹⁶⁹ Article 46(2) FDREC. According unpublished Master thesis by Abate Nikodioms Alemayeh, *Ethnic Federalism in Ethiopia: Challenges and Opportunities*, university of Lund, 2004, article 46(2) is an approach towards ethno-linguistic approach.

¹⁷⁰ Article 39 of the constitution; It is one of the most controversial articles in the constitution when it gave recognition to the rights of Nation, Nationalities and Peoples of Ethiopia up to succession. See this thesis to

Ethiopia is ethnically a diverse state with a population that speaks about 80 languages with an approximate 60 to 65 ethnic groups¹⁷¹. The constitution establishes nine Federal states and one city administration, Addis Ababa¹⁷² which is the capital city of the country and is also the seat of the federal government which has accountability to the Federal government.

The government structure of the Federal and the State governments incorporates three branches of government which are established based on the principles of separation of power and check and balances¹⁷³. The Federal government has a bi-cameral legislative organ, the executive branch which is represented by the prime minister who shall be the head of the executive in the company of accountability to the Parliament¹⁷⁴ and the Judiciary which has supreme judicial authority in the country and all judicial power is vested in the Federal Supreme Court¹⁷⁵.

Ethiopia is a parliamentary democracy¹⁷⁶ with multi party election. The federal parliament is the highest organ of the federal government and the political party which has won the largest number of seats in the parliament shall arrange a government¹⁷⁷. The highest executive authority in the Federal Democratic Republic of Ethiopia shall reside in the Prime Minister and the Council of Ministers¹⁷⁸.

better understand the gravity of the issues in domestic politics and law, Abate Nikodioms Alemayeh, *Ethnic Federalism in Ethiopia: Challenges and Opportunities*, university of Lund, 2004

¹⁷¹ D. Donovan and Getachew Assefa, *Customary law and Human Rights: Homicide in Ethiopia* (2000).

¹⁷² Article 47 and article 49 of the constitution

¹⁷³ Article 50 of the constitution

¹⁷⁴ Article 73 of the constitution

¹⁷⁵ Article 78 of the constitution

¹⁷⁶ Nahum, Fasil, *constitution for a nation of Nations, the Ethiopian prospect*, 1997, the red sea press Inc, Asmara, Eritrea, page 52

¹⁷⁷ Article 50 and 71(1) of the constitution

¹⁷⁸ Article 72(1) of the constitution

The judiciary branch of government has three levels¹⁷⁹, the first level is called the Federal First Instance Court which has the material jurisdiction to see civil cases which have a pecuniary amount of less than 500, 000 Ethiopian Birr, and cases involving personal issues, marriage, divorce and certain criminal cases.¹⁸⁰

The Federal High Court is an appellate court for decision given by the first instance court and has also first instance jurisdiction to hear cases arising from dispute on international laws which Ethiopia is part of, cases where the federal government is a party to the case, homicide and other criminal offenses, corruption and civil cases where the matter of the issue involves more than 500, 000 birr, and when the parties to the cases involve parties from different regions and others¹⁸¹.

The Supreme Court is the highest court of the country. The Supreme Court does not have original jurisdiction to hear cases, but it is an appellate court for cases decided by the federal high court¹⁸². Additionally, the Supreme Court has Cassation jurisdiction for cases that are decided by it in its appellate jurisdiction or final decision given by the high court based on ‘fundamental error of law’ and also cases decided by the state supreme courts¹⁸³.

Generally the federal judicial organ has the power to hear cases arising out of federal laws¹⁸⁴, including federal commercial laws¹⁸⁵, penal laws¹⁸⁶, international laws that the

¹⁷⁹ Article 78 of the constitution

¹⁸⁰ Proclamation 25/96 for the establishment of federal courts, article 11 and 12

¹⁸¹ Proclamation 25/96, article 13, 14 and 15

¹⁸² Ibid, article 9

¹⁸³ Proclamation 25/96 article 10 and article 80(3) and (5) of the constitution

¹⁸⁴ Proclamation 25/96, article 3

¹⁸⁵ Article 55(4) of the constitution

¹⁸⁶ Legislating on criminal laws is the function of the federal government, regional states are only allowed to issue criminal laws when they want to make criminal offences that are not included in the federal penal code, Article 55(5) of the constitution

country is a party to, cases based on the federal constitution, cases involving residents of two or more states.

Regardless of the jurisprudential functions of courts in interpreting the laws of the country, the Ethiopian legal system gives the ultimate function of interpreting the federal constitution to a political organ, the House of Federation¹⁸⁷.

The House of Federation is the upper house of the federal parliament where membership is ensured for each ethnic group with one representative appointed from the regional parliaments and one more representative for each additional one million of that ethnic group¹⁸⁸. Chief Justice Marshal in *Marbury v. Madison*¹⁸⁹ case stated that it is 'up to the court to know what the law is' and this is truly the case in the Ethiopian system. According to article 62(1) of the constitution the primary function of the house of federation is to interpret the federal constitution. However, one of the daily activities of courts in any jurisdiction is to interpret laws of the land and to decide the legal disputes brought before them.

Issues on the interpretation of Ethiopian constitution are still arguable but I believe that the constitution has only given the power to the House of Federation when there is a conflict of interpretation of constitutional provision rather than to deal with interpreting constitution every day. Article 83(1) of the constitution provides that 'disputes regarding constitutional matters shall be decided by the Council of the Federation'. Therefore, according to this article the power of the House of Federation is to give the

¹⁸⁷ Article 62(1) of the constitution

¹⁸⁸ Article 61(1) of the constitution

¹⁸⁹ *William Marbury v. James Madison*, (Secretary of State of the United States), Supreme Court of the United States 5 U.S. 137 February, 1803.

final decision on the interpretation of constitutional provisions and for this function the constitution establishes Council of Constitutional Inquiry, which shall investigate and submit its recommendation to the House for decision¹⁹⁰. At the same time the House shall meet at least twice a year¹⁹¹.

The Federal First Instance Court and High Court may be established by countrywide or in some parts of the country by a two third majority decision of the House of Peoples' Representative, if and when deemed necessary¹⁹². But there is only one Supreme Court which is established by the constitutional provision and its seat is Addis Ababa¹⁹³. Regional states have their own constitution and Supreme Court for all matters recognized as regional matters in the constitution¹⁹⁴. The regional courts are given agency power to hear federal cases arising from federal laws that are still applicable in their own jurisdiction¹⁹⁵. In these circumstances the federal constitution has given agency power to the state courts to handle what should have been otherwise handled by federal courts, but the agency power is not given on equal competence bases. For cases that should have been handled by the federal first instance courts shall be heard by state high courts and cases that should have been handled by federal high courts are given for state Supreme Courts¹⁹⁶.

¹⁹⁰ Article 82(1) and 84 of the constitution, the council of constitutional inquiry is composed of the 11 members including president and the vice president of the Supreme Court, six legal experts appointed by the president and three persons from the house of federation.

¹⁹¹ Article 67 of the constitution

¹⁹² Article 78(2) of the constitution and see also supra noted # 8, page 99

¹⁹³ Article 78 of the constitution and proclamation 25/96

¹⁹⁴ Article 52 powers of state and article 50(2) of the constitution

¹⁹⁵ Article 50(5) of the constitution

¹⁹⁶ Article 80 of the constitution

When we see the laws of the country we find federal constitution, proclamations¹⁹⁷ legislated by the House Peoples' Representative (HPR) which is the lower house of parliament which has the primary function to make laws of the federal government, regulation¹⁹⁸ by empowered executive bodies and international laws ratified by the country.

Supremacy of the constitution is one of the principles adopted by the constitution and in accordance with article 9 of the constitution the federal constitution is the supreme law of the land. All laws (including state laws), customary practices and decision made by state organ or public organ inconsistent therewith are null and void¹⁹⁹. This very article in its sub section 4 recognizes international human rights instruments ratified by Ethiopia as an integral part of the law of the land²⁰⁰.

International human rights instruments in the legal system are considered as part of the applicable laws in the country, but when it comes to discussion about their status in hierarchy of the laws there is no consensus about them²⁰¹. One part of the discussion held that international human rights are superior to the constitution itself²⁰². The justification for this is article 13(2) of the constitution which provides, (chapter 3 enumerates human and democratic rights) shall be interpreted in a manner consistent with the Universal Declaration of Human Rights, international human rights covenants and conventions ratified by Ethiopia.

¹⁹⁷ Article 55(1) of the constitution, the HPR has the authority to make laws on constitutionally designated federal matters

¹⁹⁸ Article 77(14) of the constitution

¹⁹⁹ Article 9(1) of the constitution

²⁰⁰ Article 9(4) of the constitution

²⁰¹ Action professionals' Association for the People, APAP, (one of the famous local human rights NGO in Ethiopia) research on the status of human rights in the Ethiopian legal system argued in the same way.

<http://www.apapeth.org/Articles/HRMechanismsEthiopia.html>, visited on March 29, 2009

²⁰² Ibid

The country already ratified a number of international human rights instruments including the followings,: International Convention on Civil and Political Rights (ICCPR), International Convention on Economic Social Cultural Right ICESCR²⁰³, and Convention against Genocide, Convention against Torture and all Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)²⁰⁴, Convention on the Elimination of All forms of Discrimination against Women (CEDAW)²⁰⁵ and other major international and regional human rights instruments. Therefore, when the constitution restrict the interpretation of the rights recognized under it to be interpreted with inspiration higher than its jurisprudence, meaning international instruments the country ratified including the above listed conventions, it is in a way making international human rights instruments superior at least for the rights provisions²⁰⁶.

The other part of the debate²⁰⁷ lies in the interpretation of the legal implication of the ratification of international instruments by the parliament. One of the functions of the House of Peoples' Representatives is to ratify²⁰⁸ international treaties signed by the executive and through ratification the House will publish the instruments as law of the country. The last stage of law making process in Ethiopia is promulgation of the document in the Federal official *Negarit* gazette,²⁰⁹ which gives official legal status to laws by the parliament. International human rights instruments ratified by the house of

²⁰³ Ethiopia ratified ICESCR on 11 Jun 1993 and it came into effect on 11 Sep 1993

²⁰⁴ Ethiopia ratified CAT on 14 March 1994

²⁰⁵ The country signed the convention on 8 July 1980 and ratified it on 10 December 1981

²⁰⁶ Action professionals' Association for the People, APAP, (one of the famous local human rights NGO in Ethiopia) research on the status of human rights in the Ethiopian legal system argued in the same way. <http://www.apapeth.org/Articles/HRMechanismsEthiopia.html>, visited on March 29, 2009

²⁰⁷ Ibid

²⁰⁸ Article 55(12) of the federal constitution of Ethiopia.

²⁰⁹ Proclamation # 3,1995, Proclamation for the establishment of Federal Negarit Gazette and proclamation # 14, 1995 the proclamation issued to define the law making process of the House Peoples' Representatives.

parliament shall only attain legal status when ratified by the House of peoples' Representative and when it is published in the official gazette²¹⁰.

Therefore, the conclusion of the other part of the argument is that human rights instruments have the same hierarchy in Ethiopia as proclamations made by parliament. They can only be officially recognized as law in the domestic system when they are published by the gazette and because of this they have the same legal status as proclamations. One of the legal implications of this conclusion is that whenever proclamations by parliament are inconsistent with each other, inconsistencies are solved by rules of interpretation; and one of the rules of interpretation is that the latter law derogates the earlier law. Therefore, if human rights instruments have equal status with proclamations, their applicability can simply be repealed by new law from the parliament.

The significance of this discussion on the status of international human rights instrument in Ethiopia is of course beyond academic curiosity. It is currently a daunting subject for human rights enforcement in the country, because some legal scholars and human rights NGOs which includes APAP are now considering this predicament as an obstacle for applications of international instruments by courts. Courts in Ethiopia by law are obligated to interpret only laws²¹¹ that are published in the official gazette and almost of all of human rights instruments which Ethiopia signed are not fully published in the gazette.

Therefore, whenever courts are confronted with issues that demands interpretation of international human rights instruments, they raise the non publication of the instruments

²¹⁰ The Ethiopian legal system is a dualist system when it comes to ratification of international treaties.

²¹¹ Proclamation #1, 1995, Proclamation for the establishment of the Federal Negarit Gazette, article

as a defense. Courts only take judicial notice when the law is officially published. Moreover, this is a problem for courts because the non publication inhibits them to interpret human rights provisions included in the constitution in the manner consistent with instruments ratified by Ethiopia²¹².

The status of all international human rights instruments including the international convention against genocide is in a similar limbo in Ethiopia. For that matter, Ethiopia is the first country in the world to ratify the convention.²¹³ Besides almost being one of the first countries to incorporate genocide as a criminal offence in the national legal system through the 1957 Ethiopian penal code punishing crime with appropriate punishment according to the circumstances²¹⁴.

The genocide trial of the Derg officials which is the case study of the paper was instituted against the members of the Derg regime. The Special Prosecutor Office charged these individuals with genocide and crimes against humanity, a crime prohibited by the 1957 penal code of the Imperial government of Ethiopia rather than on the Convention²¹⁵.

²¹² Action professionals' Association for the People, APAP, (one of the famous local human rights NGO in Ethiopia) research on the status of human rights in the Ethiopian legal system argued in the same way. <http://www.apapeth.org/Articles/HRMechanismsEthiopia.html>, visited on March 29, 2009

²¹³ <http://www.preventgenocide.org/law/domestic/ethiopia.htm>, the country ratified the convention on July 1949, visited March 29, 2009

²¹⁴ Art. 281. Genocide; Crimes against Humanity, The Penal Code of the Empire of Ethiopia of 1957

²¹⁵ The first charge of the case against the officials, Article 281 Genocide; Crimes against humanity of the Penal Code of Ethiopia 1957

Chapter Five

Analysis of the trial

5.1 Introduction

Any person, who is a criminal suspect or accused of any criminal act is equal human being with the same rights as any other ordinary person. Crime of genocide is not an exception to this rule. Individuals accused or convicted of genocide are the same natural persons entitled with the same human rights protections. Their involvement in a dark history in any country is not an excuse to deny them the entitlement to benefit from human rights guarantees recognized for everyone. However, human rights protections are not a shield to block criminal responsibility for their actions but it is a guarantee for any violations of their rights.

“The need of victims and the society as a whole to heal from the wounds inflicted upon them by the former regime...” has to be “balanced to the States commitment to human rights and dedication to the rule of law.”²¹⁶ Clearly, prosecution is one way to deal with criminal activities of the past²¹⁷ yet it is not a green light for orchestrated state revenge against the people who had hands in the past violations.

Criminal trials against suspects of any criminal activities have imperative human rights obligations to observe and to follow through the process. The course of prosecution to bring about justice and any other state intervention including the adjudication process to bring criminal suspects to justice has a great deal of obligations to follow. Human rights obligations of the State require and obligate this entire endeavor to respect, protect and

²¹⁶ Sarkin, Jeremy, the tension between Justice and reconciliation in Rwanda: politics, human rights, due process and the role of the Gacaca court in dealing with genocide, *Journal of African Law*, vol. 45, no. 2 (2001), page 143-172, Cambridge university press on behalf of the school of Oriental and African studies, page 143.

²¹⁷ Ibid, page 143

fulfill²¹⁸ all human rights of the people under prosecutions. As prosecution is important to achieve certain benefits to the society, and it is also important for justice since “Justice is a critical aspect of ensuring respect for human rights and rule of law, necessary to prevent future violations.”²¹⁹ Hence, criminal trials will have dual policy to accomplish. The first policy is to redeem historical crimes via criminal prosecutions and the second is to respect human rights of the accused in order to materialize justice in the very society that demanded prosecutions²²⁰. Similarly genocide trials could serve justice by punishing perpetrators, while respecting the rights of the accused to achieve justice now and for the future²²¹. One of the ways to achieve justice in the prosecution will be to respect the fair trial rights of the defendants, including speedy trial right of the accused.

Sarkin identified general conditions that have to be taken into account before a country decides to prosecute crimes committed in the past. One of the conditions he identified was the capacity of the judiciary to guarantee fair trial in the prosecution.²²² Fair trial right, however, is not just simply a condition for policy decisions; rather it is a fundamental right which ‘can be said the central basis for the proper implementation of

²¹⁸ These three obligations are identified by Human rights Committee established by International Convention on Civil and Political Rights, ICCPR under article 28 to evaluate and monitor State observance of their obligations under the treaty.

²¹⁹ Sarkin, Jeremy, the tension between Justice and reconciliation in Rwanda: politics, human rights, due process and the role of the Gacaca court in dealing with genocide, *journal of African law*, vol. 45, no. 2 (2001), page 143-172, Cambridge university press on behalf of the school of Oriental and African studies.

²²⁰ This is logically true since justice can be achieved through respecting human rights and rule of law because of this the prosecution of the trial should not be a forum for revenge and violation of the rights of the defendants rather it should respect and enforce the rights of the defendants to achieve justice.

²²¹ It can be debated how much criminal prosecutions are necessary for the stability and democracy of a country but one thing is true, if human rights violations are not resolved duly in any democratic fashion the prospect of a country could be fragile which encourages impunity for future actions. To see good arguments about the benefits of prosecution see, K. Kindiki, *Prosecuting the Perpetrators of the 1994 genocide in Rwanda, its basis in international law and the implications for the protection of human rights in Africa*, 2001, *African Human Rights Law Journal*.

²²² Sarkin, Jeremy, the tension between Justice and reconciliation in Rwanda: politics, human rights, due process and the role of the Gacaca court in dealing with genocide, *journal of African law*, vol. 45, no. 2 (2001), page 143-172, Cambridge university press on behalf of the school of Oriental and African studies., page 148

all other rights’²²³. Fair trial is recognized under ICCPR. States Parties to the convention should respect the right, even when the prosecution process is aimed at to punish people suspected of genocide and crimes against humanity.²²⁴ Fair trial rights guarantees individuals to exercise speedy trial rights which protects them from lengthy trial and undue delays. The proper administration of justice requires any criminal prosecutions to respect and fulfill the fair trial rights, which includes speedy trial guarantee. Furthermore, fair trial rights also make sure that other human rights of the accused are not violated simply, because one becomes an accused of criminal activity, including those heinous crimes in the world.

This chapter then evaluates Mengistu Hailemariam’s genocide trial by applying a test that was devised to analyze speedy trial protection of the accused. Particularly the test shall be used to evaluate whether this high profile trial respected the speedy trial right of the Derg officials who stood charged for genocide and crimes against humanity. Secondly it shall look whether the final judgment could be considered proper, taking into account the outcome of the first issue. Such analysis is important because genocide and crimes against humanity are not grounds to deny fair trial guarantees including the right of speedy trial.²²⁵

The trial of Mengistu’s shall be evaluated by the four parts of the Barker test to see whether the trial was in fact delayed, if it is, what were the reasons for the delay, based on

²²³ Hailegabriel, Debebe, *Prosecution of Genocide at International and National courts: A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/Rwanda*, a dissertation submitted in partial fulfillment of the requirements of the degree LLM (Human Rights and Democratization in Africa), Faculty of Law, University of Pretoria, 2004, page 23

²²⁴ Article 2 of ICCPR

²²⁵ Natural theories of human rights is a good justification for anyone to claim the same human rights even when they are accused or even convicted of heinous crimes as genocide and crimes against humanity. Therefore, the fact that the Derg officials were accused of genocide cannot be an excuse to deny them speedy trial; the prosecution must respect their right to speedy trial.

the confirmed delay the third part of the test shall look whether the defendants demanded speedy trial protection against the delay and finally the last part shall identify if the delay did actually create any prejudices against the defendants, which require speedy trial remedy. The whole objectives of using Barker test is first to better understand the specific protections of speedy trial right in practice and second to find out whether Mengistu's genocide trial respects the speedy trial right of the named defendants or not.

The importance of analyzing speedy trial right in the case is because of two reasons. The first reason is, because speedy trial right is a minimum guarantee any criminal prosecutions should respect and the second reason is, analysis of speedy trial right produces a perfect ground to evaluate how well criminal convictions out of cases that either respected or violated speedy trial right serve the expected objectives of punishment for the society and for the country at large. Additionally, this analysis is also important because it can serve as a nice juncture to evaluate the capacity of Ethiopian judiciary on its responsibility to enforce human rights protection in the country. Naturally, courts are the first place to look for redress when human rights violations occur²²⁶.

The Transitional government made some efforts to prosecute the Derg officials since the fall of Mengistu's regime. On May 28, 1991, the Communist government was officially deposed when the revolutionary armies led by Tigray Peoples' Liberation Front, TPLF and a coalition of armed groups, Ethiopian Peoples' Revolutionary Democratic Front, EPRDF controlled the capital city. Transitional Charter was ratified which laid out the State structures and demarcation of different regions during the transition effective till the

²²⁶ Hailegabriel, Debebe, *Prosecution of Genocide at International and National courts: A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/Rwanda*, a dissertation submitted in partial fulfillment of the requirements of the degree LLM (Human Rights and Democratization in Africa), Faculty of Law, University of Pretoria, 2004, page 1

coming into force of the Federal constitution in 1995²²⁷. In the meantime there were country wide campaigns to hunt down members of the Derg and Workers' Party of Ethiopian (WPE)²²⁸ and in addition to massive public calls to those Derg officials demanding their surrender and handing over arms to the transitional government. Many had responded to such calls by surrendering themselves and many had defied the call by fleeing out of the country like President Mengistu Hailemariam,²²⁹ who fled a week before the revolutionary army took over Addis Ababa. Other three high officials received political asylum in Italian Embassy, including General Tesfaye Gebrekidan who became an Interim president for a week time when Mengistu fled to Zimbabwe. Almost all of the defendants in Mengistu's file, except those tried in absentia, were arrested around this time.

In 1992 the government officially decided to prosecute Mengistu and his accomplices for several of the crimes committed during his reign.²³⁰ Special Prosecutor Office, SPO was established in August 1992 to prosecute these officials for different crimes alleged to have been committed when they were in power. In October 1994 the SPO filed its first

²²⁷ The Charter of the Transitional government of Ethiopia was a constitutional document that defined the powers and the responsibilities of the president, the legislature and the judiciary in addition to dividing the entire country into 14 regions in the company of certain administrative powers.

²²⁸ Workers' Party of Ethiopian was the lone governing political party when the country ratified the Ethiopian People's Democratic Republic Constitution in 1987.

²²⁹ The Ethiopian legal system allows prosecution in absentia for certain crimes where the crime allegedly committed by the person involves rigorous imprisonment of more than 15 years and when the article invoked against the person is homicide and other big crimes including article 281, Genocide; Crimes against Humanity of the 1957 penal code.

²³⁰ Tiba, Firew, The Mengistu Genocide Trial in Ethiopia, *Journal of International Criminal Justice* 5, 2007, page 513-528, page 514, see also Hailegabriel, Debebe, Prosecution of Genocide at International and National courts: A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/Rwanda', a dissertation submitted in partial fulfillment of the requirements of the degree LLM (Human Rights and Democratization in Africa), Faculty of Law, University of Pretoria, page 35; D. Haile 'Accountability for the Crimes of the Past and the Challenges of Criminal Prosecution; The case of Ethiopia' (2000) *Leuven Law Series* 42, page 28.

charges before the Central High Court against Mengistu's and other 74 officials on 211 counts of genocide and crimes against humanity in violation of article 281 or alternatively²³¹ on aggravated homicide in violation of article 522 of the Penal Code of Ethiopia.

There was a wide acceptance of this decision of the government from domestic and international sources. Nevertheless there were also different concerns of the rights of the accused in the processes. For this effort many countries extended large sums of financial and technical supports to the government.²³²

Mengistu's trial was a courageous move by Ethiopia government. Since the trial "was the first African trial where an entire regime was brought to justice before a national court for atrocities committed while in power"²³³. SPO divided the prosecutions into three different categories of defendants; the first category included those officials who were responsible for policy and decision making, the second category is for persons who passed on orders or those who reached decision on their own and the last category is for those people who were directly responsible for carrying out the purported crimes²³⁴. In addition to this, some defendants were also prosecuted in many other files in different parts of the country. "There were several trials going on at different locations throughout the country both at Federal High court divisions and the Supreme Courts of regional

²³¹ The Ethiopian criminal procedure code in article 113 permits bringing alternative charges where it is doubtful what offence has been committed.

²³² U.S. government was one of the supporters to Ethiopian government's effort in prosecuting the Derg officials through technical and financial support for the trial.

²³³ Tiba, Firew, The Mengistu Genocide Trial in Ethiopia, *Journal of International Criminal Justice* 5, 2007, page 513-528, 513.

²³⁴ Ibid, page 514.

States of Ethiopian Federations”²³⁵. The rationale for spreading the trials in different locations is to try the accused in the area where the alleged crimes have been committed.

Apart from being the first to prosecute the entire regime for human rights violations, the Ethiopian trials were different, because the prosecutions were not conducted under international law of genocide which excludes protection of political groups. Rather it was instituted under Ethiopian criminal law which criminalizes the destruction of groups on the grounds of their political belief as genocide and crimes against humanity²³⁶.

The inclusion of destruction of political groups as a crime of genocide has its own problems and generated a great deal of debates by legal scholars, by students and scholars of genocide studies²³⁷. It is not relevant here to discuss the debate in detail, but it is enough to know that Ethiopian criminal law protects political groups from genocide by punishing politicide²³⁸ as a crime of genocide. But the defendants raised this issue as an objection to the charges and the issue also contributed for a split of judgment by the court.²³⁹ Moreover, the absence of clear solution to this kind of debate by Ethiopian lawyers including judges and scholars of genocide necessitated the Federal High Court to take more time to deliberate on the issue; which eventually caused lengthy trial.

²³⁵ Tiba, Firew, The Mengistu Genocide Trial in Ethiopia, *Journal of International Criminal Justice* 5, 2007, page 513-528, page 514.

²³⁶ Kiss, Edward, *Revolution and Genocide in Ethiopia and Cambodia*, Lexington Books, UK, 2006, page 106.

²³⁷ There are certain sociology professionals for instance Leo Kuper, who claimed that political belief is a determining factor as ethnicity because this it is impossible to separate political victims from ethnic and racial victims. On the other hand political Scientists claimed the difficulty to distinguish politically motivated killing during political power struggle from killing a certain group because of their political idea that is under protection in Ethiopia as genocide.

²³⁸ Politicide is a formulation of Barbara Harff and Ted Robert Gurr to distinguish this term from political mass murder or deliberate annihilation of political groups from intentional killing of ethnic, racial, national and religious groups or genocide. Mentioned in Kiss, Edward, *Revolution and Genocide in Ethiopia and Cambodia*, Lexington Books, UK, 2006, page 106

²³⁹ See the opinion of the dissenting judge in *Special Prosecutor Office vs. Col. Mengistu et al*, December 12, 2006 Federal High Court of Ethiopia.

5.2 The First Part of Barker Test, the Length of Delay

To begin the analysis, there should be a consensus whether Mengistu and his co-defendants could claim to demand protection of speedy trial rights. As mentioned in the earlier parts the American court decided that it is only the accused that can benefit from speedy trial right. A person becomes an accused when s/he is officially charged with a commission of a crime. The Ethiopia constitution in article 20 whose title reads as ‘Rights of the persons accused’ identifies the specific rights of an accused. One of the rights of an accused mentioned under article 20(1) is speedy trial right²⁴⁰. The incorporation of speedy trial right or as the constitution puts it, the right to be tried within a reasonable time is a recognized right of an accused. Therefore, since all defendants in Mengistu’s trial were charged with criminal offences, they are the accused with the right to be tried within a reasonable time without delay.

The first step in the first part of the Barker test is to identify the initial date of the case. Calculation of delay takes into account the date when the case first filed and runs till the last date where judgment was passed. There is no quantified time which we could call delay, such conclusion can only be made after thorough evaluation of the specific circumstances of each cases. Reasonableness of a delay or time depends on the circumstances attached to the case under consideration.

²⁴⁰ Article 20(1) reads, “Accused persons have the right to a public trial by an ordinary court of law within a *reasonable time after having been charge*”, emphasis added.

The SPO brought criminal charges against Mengistu and his officials in October 1994.²⁴¹

The judgment was passed on December 12, 2006 and adjourned until January 11, 2007 to pass the sentences.

The length of delay is the fundamental factor to apply the Barker test. Delay can only be decided when a delay is preemptively prejudicial to the defendant's case. The Ethiopian court took more than a decade to decide Mengistu's case; to be precise it took 12 years and 2 months. 12 year is indeed a long time, which undoubtedly makes Mengistu's case the world's longest genocide trial ever.²⁴² It is in fact a famous trial because of the time it had taken. Tiba referred to the case as the "marathon trial."²⁴³

However, speedy trial protection does not generally protect any types of delays simply looking the length of the trial. The kind of delays protected by the right as mentioned above are the ones that are preemptively prejudicial to the defendant's case. Therefore, the important questions here are, what kinds of delays are prejudicial to the defendants' case and how can we recognize them. In order to answer these questions we need to look into the circumstances of the case to find specific indicators which show whether the delay in the case is a common delay or not or in another way, whether the delay was excessive or not.

Mengistu's 12 years old case managed to achieve a rare reception in genocide studies and in history as well because of its age. The case became the longest genocide trial in the

²⁴¹ Central High Court was the second highest court of the transitional government which had the material jurisdiction to hear cases like genocide. When the Federal constitution was ratified and when the country became a Federal State, the case was consequently transferred to the second highest court of the federal government, to the Federal High Court. The case was later transferred to Federal High Court's First division in the newly established Federal structure under the Federal constitution.

²⁴² Tiba, Firew, *The Mengistu Genocide Trial in Ethiopia*, *Journal of International Criminal Justice* 5, 2007, page 513-528, page 516.

²⁴³ *Ibid*, page 514.

world; this ‘achievement’ is not a common ‘success’ for other genocide trials. The trial was one of a kind and extraordinary lengthened to last for more 12 years. Mengistu’s case represents a classic example of delayed justice²⁴⁴. Twelve years does not seem a common delay for any type of trial, it was indeed uncommon particularly taking into consideration of the status of the defendants.

Other African countries had brought similar charges against former government officials. Rwanda is a good example here because of similar charges and relatively similar political and economic realities. However, the Rwandan national courts had passed decisions in a much shorter time than the Ethiopian counterparts.²⁴⁵

The trial through these long years had invoked many criticisms and condemnations by different institutions for its pace and eventual delay. Some of the strongest concerns came from Amnesty International and Human Rights Watch²⁴⁶ which had followed the trial since the beginning. Both institutions have properly reflected their concerns every year over the slow pace of the trial and consequently on the time taken to decide the case. The report of the United States State Department on the trial revealed change of tone by the US government invoking the delay in Mengistu’s trial. Kiss also reflected his personal concern on the erratic pace and the length of time taken by the court as a major challenge

²⁴⁴ Tiba, Firew, The Mengistu Genocide Trial in Ethiopia, *Journal of International Criminal Justice* 5, 2007, page 513-528, page 527.

²⁴⁵ The Rwandan national courts heard genocide cases domestically but they have not spent this much time to pass judgment on the case. See Rwandan genocide cases and this conclusion is logical because the Mengistu’s case is the longest genocide case ever to stay undecided. The Rwandan took a wiser decisions to solve delay in prosecution by prosecuting individuals accused of genocide by three different institutions; national courts, Gacaca courts and ICTR.

²⁴⁶ The annual reports of Amnesty International report on Ethiopia, 1997, available at <http://www.amnesty.org/ailib/aireport/ar97/AFR25.htm>, (visited August 7, 2009) and Human Watch available at <http://www.hrw.org/reports/pdfs/ethiopia/ethiopia94d.pdf>, (visited August 7, 2009) and <http://www.hrw.org/reports/1997/ethiopia/Ethio97d-03.htm>, (visited August 8, 2009)

in the case. He also mentioned his frustration being shared by scholars of genocide studies and human rights activists in Ethiopia and elsewhere.

All of the above concerns, frustrations and labeling have not been created without a legitimate reason. All of them raised the length of time taken by the court as a fundamental problem for human rights protection in the country and a challenge on the eventual judgment on the case. All of the criticisms agreed on the uncommon and extraordinary nature of the delay seen in the case. Because of this delay even the Ethiopian public whose interests are the primary guiding policy of the prosecution reduced its keen support for the trial. It was a common thing on a hearing day to see many people lining up since dawn to attend the trial and sometimes the number of turnout was beyond the capacity of the court room²⁴⁷. But as times go, people lost interests and even the government's media stations stopped broadcasting the trial through TV and radio. All of these facts can testify the extraordinary nature of the delay and the criticisms can also be used latter to evaluate the reliability of the judgment in the eyes of the society²⁴⁸.

Therefore, Mengistu's genocide trial can be said to have suffered an uncommon delay which preemptively prejudiced the defendants' case, in view of the fact that it took more than a decade. However, the defendants in the case have the rights to be protected against uncommon delays, because such type of delay could be a violation of speedy trial right besides a ground to taint the reliability of the trial itself. Justice Souter in the *Doggett*

²⁴⁷ People who wanted to attend in the case have to book prior to the date of hearing and for those people who could not manage to attend the trial the hearing used to be transmitted by the national TV.

²⁴⁸ Prosecuting historical crimes should have in its center the interests of the society and the country's peace process and all these concerns should be the backbone of the trial otherwise the whole process shall loss its reliability. The reliability aspect of the trial after decision can retrospectively be used to evaluate the excessive nature of delay identified in the case.

decision made it clear that uncommon delay or excessive delay as he used the terms interchangeably, affects the reliability of a trial in ways the defendants cannot prove.

Court decisions should be reliable; it should be reliable enough to rehabilitate the convicted person appropriately and it should also be sufficiently reliable to redeem the crimes committed against a society. Otherwise the mere conviction and subsequent sentence could not achieve the purposes of criminal law itself²⁴⁹. Moreover, unreliable decisions could not make a society safer as long as the criminal system is used to retaliate than to rehabilitate.²⁵⁰ The delay in Mengistu's trial is not solely a theoretical one. It was rather obvious even for the trial court itself. As a result the trial court took the delay as a mitigating ground for sentencing²⁵¹ and in a way tried to maintain the reliability of the trial possibility affected by the delay.

So far the paper identified uncommon and excessive delay in Mengistu's trial after employing the first part of Barker test. Excessive delay acknowledged by the first part of the test is a triggering factor in speedy trial right analysis. Therefore, this type of delay demands proper evaluation to be made on the case using the other parts of the test to protect the accused from prejudices due to this uncommon delay. Besides the fact that excessive delay serve as a sign, which requires an urgent application of speedy trial right

²⁴⁹ The primary purpose of criminal sanctions according to the Ethiopian criminal law is the rehabilitation of the convicts than retribution; see the Penal Code of Ethiopia.

²⁵⁰ Unreliable decisions at the end could build up suspension and mistrust against State institutions, including courts. When society losses trust on state institutions especially the judiciary, primary human rights protector, peace and order generally and human rights enforcement in a country will be under questions. Because all decisions made by these institutions could not counted as a guarantee to enforce human rights and to secure order and peace. The reliability of court decisions in an aged file is similar; first it shall not respect the rights of the defendant and second it cannot achieve the interests of the society.

²⁵¹ 'Especially in view of the length of time that has passed since the commission of the crime and the number of years the defendants kept in custody during the trial, imposing the maximum penalty will go beyond the pertinent goals of punishment and would amount to revenge.' One of the mitigating grounds taken by the majority opinion in the judgment of the Federal High Court of Ethiopia on Col. Mengistu's et al genocide trial passed on December, 12 2006, cited in Tiba, Firew, The Mengistu Genocide Trial in Ethiopia, *Journal of International Criminal Justice* 5, 2007, page 513-528, page 527.

guaranteeing protections of the defendants from violations of various human rights and speedy trial rights itself and here it can also be used to maintain the reliability of the trial and the decisions. Because of this the paper now moves to identify and evaluate the reasons for this uncommon delay seen in Mengistu's trial using the second part of the test.

5.3 The second part of the test; reasons for the uncommon delay

In this part of the test the paper shall try to identify all possible reasons for uncommon delay recognized in Mengistu's genocide trial. The second part of the Barker test is a very important part. Sheer existence of delay in a case shall not or should not have to lead to dismissal of the charges brought against the accused, as dismissal is the effective remedy for speedy trial right claim on the time of violation of this right due to uncommon delay in a case. To begin our investigation in the second part of the test, we need to first identify the sources of the delay and evaluate them along with all relevant circumstances surrounding the case. Additionally the investigations shall be easy through looking the actions of the three parties²⁵² differently, since all of them could cause delay. Along with the investigation process here in this part, the paper shall also evaluate the reasons identified whether if they were reasonable not necessarily to entail violations of rights or if they were sufficient to violate speedy trial right and various other rights of the accused. However, the considerable weights due for the reasons should be different based on the faulty party who caused the delay, because not all of the three parties have the same responsibilities in the process.

²⁵² As it is known the three parties in the case are, the court, the prosecutor and the defendants.

5.3.1 The trial court

The Central High Court and the Federal High Court have three judges with one presiding judge and two other associate judges over Mengistu's trial.²⁵³ The ways judges are assigned to cases are rather internal works of the judiciary that shall be decided by the President of the High Court or Supreme Court. Mengistu's case had undeniably massive significance for the country and for the government. Hence, it is reasonable to expect certainly imperative for the judiciary to assign judges that are competent, qualified and impartial as well. As opposed to evaluate the personal competence of each judges in Mengistu's trial, the prevailing practice of recruitment and promotion through the different tiers of judges in Ethiopia should be mentioned briefly to appreciate more the types of judges we have in the judiciary.

Lawyers that finished studying Law in the then lone²⁵⁴ University in the country go directly to judiciary to work as clerks²⁵⁵ for a short period of time, and after that they will be assigned to preside over First Instance Courts. The judiciary suffers weakness due to unqualified fresh graduates or lawyers with few years of judicial experience are presiding in different courts in the country. To make matters even worse the legal education system itself is criticized being too theoretical and too ambitious, which consequently denies students the practical application of laws and legal theories to real cases.²⁵⁶

²⁵³ Proclamation # 25/96, Proclamation for the establishment of Federal Courts, article 23(2).

²⁵⁴ At the time when this case was started there was only one university that teaches Law at the university level and all of the judges in the case were graduates from Addis Ababa University, Law faculty. Now there are more than 10 public and private universities that teach law in the country.

²⁵⁵ Sometimes when there were not enough judges in the courts fresh graduates used to go directly to be presiding judges or sometimes after working for less than a year as clerks. This fact is still in practice especially in different regional states where there are few graduates

²⁵⁶ Legal vice presidency the World Bank, report on Ethiopian legal and judicial sector assessment, 2004,

Promotion is also ambiguous and unpredictable, as judges with some years of experience²⁵⁷ in the First Instance Courts shall be promoted to the next high courts when approved to have shown ‘good practices’. I have made interviews with current judges and former judges about the promotion and demotion of judges, all of them have no clear information on the complete standards for promotion to the High courts or even to the Supreme Court²⁵⁸. Sometimes judges go up the tiers faster than others and some stayed where they appointed for many years²⁵⁹.

Recruitment and promotion processes of the Ethiopian judiciary are different from the practice of other countries. In Ethiopia lawyers with few years of judicial experience become judges and when they become experienced, they leave the judiciary to the private sectors. In other countries judges are selected after years of practical experiences and sufficient knowledge in the area.²⁶⁰ Ethiopia may not afford to have similar practices as long as the government pays small salary to judges²⁶¹ and fails to make the court a respected institution worthy of spending a life time as a judge. Every year many judges leave the court searching for more money and personal freedom.²⁶² These all factors

²⁵⁷ There is no fixed time for a judge to be promoted to high courts, see also, Legal vice presidency the World Bank, report on Ethiopian legal and judicial sector assessment, 2004.

²⁵⁸ This fact was also mentioned in World Bank report of the Ethiopian judiciary as a problem when there is no consistent standards and procedures used to make judicial appointment and employment decisions, the lack of transparency and openness in the proceedings of the various judicial administration commissions that determine judicial selections and terms of employment. See also, Legal vice presidency the World Bank, report on Ethiopian legal and judicial sector assessment, 2004,

²⁵⁹ To mention a surprising fact about this scenario, one of the judges in the Federal Supreme Court had advanced diploma in law and most of the judges in the high court have degree in law, yet the surprise is that the high court judge had this supreme court judge as a student in his class where he teaches as part time lecturer in a university law school degree program.

²⁶⁰ America can be a good example.

²⁶¹ See, Legal vice presidency the World Bank, report on Ethiopian legal and judicial sector assessment, 2004.

²⁶² Ibid

entail an effect on competence of Ethiopian courts to prosecute the crimes of genocide and still protect human rights of the accused.

In the judiciary it has becoming an occasional practice to see different judges presiding over one case. Mengistu's trial is not an exception. The judges who were first assigned for the case have been replaced by others through the years. Such repeated occurrence has contributed for the staggering pace of the trial. At times judges in Mengistu's trial reassigned to another bench or resigned from the court totally and some other times more including the presiding ones, who were appointed by degree of seniority and experiences, leave the court²⁶³. Until the final judgment, there were 5 presiding and 6 associate judges in Mengistu's trial in a bench which works with one presiding and two associate judges. Whenever a new judge is appointed to the case, delay is highly probable until the time the new judge acquaints himself to the case that 'has eight thousands pages of legal document'.²⁶⁴ Mengistu's trial, therefore, had suffered frequent turnover of judges which is a ground to claim for further delay in the case and also good enough reason to question the qualifications of the replaced judges. Two judges who were second in rank next to the presiding judges in the same trial were reshuffled to preside when the presiding judges left the case.²⁶⁵

²⁶³ The first presiding judge left the court and entered into private practice as an attorney.

²⁶⁴ Kiss, Edward, *Revolution and Genocide in Ethiopia and Cambodia*, Lexington Books, London, page 102.

²⁶⁵ Such decisions can simply tell the advertent problems on the part of the trial court on keeping the presiding judges who are appointed because of their experiences and their competence. The fact that the other judges are not appointed to preside is because of their competence and when one of these associate judges are promoted to presiding position because the presiding judge left the bench, the case shall definitely suffer when it loses the most competent judge in the court.

The second potential reason for delay in relation to the trial court relates to the experiences of the judges in the case²⁶⁶. Despite the probableness of this reason it is very hard to bring hard facts to ascertain this detail. But according to interviews made with one of the judges who participated in the last stage of the trial, inexperience especially on major issues for instance on issues concerning whether the acts could fall under genocide and crimes of humanity in Ethiopian and international legal system were advertent. This very fact can actually be noted in the final judgment of the case, when the court failed to have anonymous decision on the alleged acts being genocide or not. The majority decision agreed that the Derg regime had committed genocide and crimes against humanity against political groups in violation of article 281 of the Penal Code²⁶⁷. However, the dissenting judge disagreed on this formulation. The dissenting judge believes that the officials should have been convicted of homicide and causing willful bodily injury, but not genocide. According to the judge, the actions taken by the Derg officials at the time were lawful and it was in line with proclamations issued to authorize officials to take actions against any political parties who were considered ‘anti-revolutionary’ and ‘anti-unitary’²⁶⁸.

²⁶⁶ The transitional government fired some of the very best and well experienced judges from the judiciary because they were despised being “an integral part of an oppressive regime” when they worked in the Derg era. These professionals who were fired could have been more appropriate to adjudicate Mengistu’s trial than others appointed later since most of the judges fired had worked in the judiciary for many years, some of these judges worked in a very top post. Some judges and prosecutors were even imprisoned and others either left the country or enter into private sector. See also, Legal vice presidency the World Bank, report on Ethiopian legal and judicial sector assessment, 2004.

²⁶⁷ See the majority opinion on Col. Mengistu et al file No. 1/1987, Ethiopian Federal High Court, 12 December 2006.

²⁶⁸ See the dissenting opinion of the judge in Col. Mengistu et. al file. Proclamations 110/76 and 129/76 authorized all government authorities to destroy and take necessary measures against anti-revolutionary and anti-unity political groups in the whole country. According to the dissenting judge these two proclamations duly repealed part of article 281, the part that protected political groups from genocide since the proclamations are issued specifically to authorize government officials to take actions against these groups.

Lack of inexperience on the part of the judges might be clear by looking at some academic debates on the actions of the Derg. There is no academic consensus on whether what the Derg did in fact constitutes genocide or not, even when the Ethiopian Penal Code recognized this as such. Kiss explains how confusing the Ethiopian law actually is, when it cumulatively recognizes genocide and crimes against humanity as a single crime. Additionally he succinctly described the difficulty to prosecute political killing as genocide when he looked the Ethiopian situation.

That in considering and prosecuting politically motivated killing and genocide, students of scholars of genocide studies would face the unpleasant moral dilemma of assessing the roles of both victims and perpetrators in precipitating the conflict or power struggle that resulted in large scale massacres.²⁶⁹

Kiss personally believed the actions of the Derg were not genocide, because not all politicide necessarily lead to genocide.²⁷⁰

Federal High Court disregarded the above material arguments and even after the decisions no clear position was achieved either by providing persuasive arguments against the academic arguments on politicide or strong refutation of the opinion of the dissenting judge. Evaluation of such fact is important because the Ethiopian law creates different legal treatment between persons convicted of genocide and crimes against humanity and other homicide, even when they received the same sentences. Genocide convicts cannot benefit from pardon or amnesty and period of limitations for both prosecutions and for sentences.²⁷¹ Therefore, the costs of inexperience, if conclusively argued in the judgment, shall cost the defendants dearly, not only for speedy trial right

see also Tiba, Firew, *The Mengistu Genocide Trial in Ethiopia*, *Journal of International Criminal Justice* 5, 2007, page 513-528, page 520.

²⁶⁹ Kiss, Edward, *Revolution and Genocide in Ethiopia and Cambodia*, Lexington Books, UK, 2006, page 105.

²⁷⁰ *Ibid*, page 129.

²⁷¹ Article 28 of constitution of the Federal Democratic Republic of Ethiopia.

analysis. Split of judgment can, therefore, is an indicator of the need for further qualifications.²⁷²

There is no reasonable ground for this paper to decide which of the above interpretations of the applicable laws are correct, but this unresolved debate could show further experiences were needed in the court especially on the application of the penal code, special laws (the two proclamations cited by the dissenting judge) and the genocide convention and other international instruments. There has never been genocide case in Ethiopia before the Derg trials, which also testify the lack of experiences on the adjudication of genocide trials as also collaborated by the interview. Federal high court had deliberated on this issues many time; first when the defendants raised an objection in the beginning, later also in the middle of the trial and obviously during the final judgment. Had there been clear and conclusive qualifications to resolve such and similar debates in the country within the qualification of the judges and lawyers, there were no needs to deal with the same issue over and over again. Because of this, the split of the final judgment in Mengistu's case can be used to testify the lack sufficient experience on the part of the judges that clearly contributed on the time taken by the trial.

Beside the split was used to question particularity the independence of the trial court, since the government had already decided the actions of the Derg as genocide and crimes against humanity. The United States Senate Foreign Relations Sub Committee on Africa agreed on this formulation.²⁷³ This view was also agreed by The Wall Street Journal

²⁷² This conclusion is collaborated by the interview given by Ato Solomon Emiru, who joined in the majority opinion in Col. Mengistu et al case.

²⁷³ The United States Senate Foreign Relations Sub Committee on Africa reached a conclusion that what the Derg did indifferent parts of the country did in fact constitute genocide under international law and Ethiopian law. U.S Congress, Senate, Committee on Foreign Relations, Ethiopia and the Horn of Africa:

which even goes further to relate the actions of the Derg with the Nazis.²⁷⁴ Ethiopian received aid from the US for the trial because the US believed that Mengistu's regime carried out genocide and crimes against humanity in the country. Such predetermination can be argued of having certain pressures on the judges, who by itself might have a link to the delay, but the paper had found no clear evidence to substantiate this possibility.

The third potential reason for delay by the court is linked to the structure of the court which handled the case. The trial court, which conducted the case was not assigned exclusively to hear this case only. Neither the transitional government nor the federal government set up a distinct bench to try Mengistu and his co defendants. The first division of the Federal High Court was assigned to hear the genocide case, but this bench had also additional responsibility as being the high court of the Federal government. Even the judges appointed to the trial were not only handling this high profile case. Ato Emiru who was Associate Judge in the first division of the Federal High Court during Mengistu's trial disclosed the workload of the bench by equally serving a trial court for a lot of high profile corruption charges and moving into different regions to hear cases in circuit benches²⁷⁵.

hearing before the sub-committee on African Affairs, 94th Congress, 2nd session, August 4-6, 1976, 66. Kiss, Edward, *Revolution and Genocide in Ethiopia and Cambodia*, Lexington Books, UK, 2006, page 111.

²⁷⁴ This newspaper described the actions of the Derg as a type of 'Holocaust' similar to Nazi Germany during the Second World War. The Wall Street Journal, "Today's Holocaust," January 27, 1986, 24, cited in Kiss, Edward, *Revolution and Genocide in Ethiopia and Cambodia*, Lexington Books, UK, 2006, page 111.

²⁷⁵ The Federal High Court was a trial court for a great number of corruption charges against government officials, big private investors and top officials of the government banks and offices. These cases alone created huge shake up in the country's political environment, financial sectors and in the whole economy in general. The cases had involved intricate reviews of myriad documents that were very fundamental in the corruption charges against large number of people in the country; therefore, the fact that this court was assigned to handle these cases stole the attention of the court from Mengistu's case that could be a reason for delay and additionally can also be a factor in the quality of the judgment.

Federal High Court has appellate jurisdiction for cases decided by the lower courts²⁷⁶.

This court had to deal with appeals coming from first instance courts along with corruption cases in addition the judges being moved around the country in circuit benches. Carrying out all these responsibilities did in fact contributed to the delay to be caused by the judiciary against the defendants in Mengistu's trial. Especially taking into consideration of the number of documents brought to the court and the importance of the case itself, the judiciary should have made more efforts to rectify these apparent causes.

The judges in this case had no specialization trainings on genocide, an issue we counted as a problem above and also they were structurally burdened to adjudicate other cases that could certainly steal proper attention to Mengistu's case. As we said above the Ethiopian genocide trial is one of the first of a kind that brought an entire regime to justice and the crime itself is 'considered the seventh worst genocide in the 20 century'²⁷⁷. The Ethiopian had clear policy to prosecute the Derg officials, but failed to establish a special bench to handle these cases only as it established SPO to handle the prosecution.

Such kind of policy is not new especially for countries that just came out of hard times as Ethiopia in 1991, namely the Rwandan government had a similar policy. The inevitability to prosecute the Derg officials of a crime that caused more than million lives was clear, but the efforts taken by the Ethiopian government were not as clear and bold as the policy's objectives. The Rwandan government did much more within a few years than the

²⁷⁶ The culture of appeal is a problem in Ethiopia. Courts always deal with a lot of appeals even when the position of the courts is very clear to the appellant. Because of this the parliament had passed a law that makes the decisions of the Federal Supreme Court cassation bench to be binding on all courts. Proclamation 454/2005 this legislation is expected to minimize the number of appeals

²⁷⁷ See Tiba, Firew, The Mengistu Genocide Trial in Ethiopia, *Journal of International Criminal Justice* 5, 2007, page 513-528, page 516, and see also <http://www.scaruffi.com/politics/dictat.html>, visited August 14, 2009.

Ethiopian government in more years. The Rwandan government requested the Security Council to establish international tribunals to prosecute the genocide. However, the Ethiopian government in the early 1990s, while still under the fresh aches caused by years of civil war, chose to prosecute the crimes within domestic courts.

As mentioned earlier the judicial branch especially in those time was not strong enough to handle this big case, however, the trial started in 1994. Even in these circumstances, the judiciary could have easily assign a special bench for the genocide trial at least for Mengistu's case, since the case counts the defendants in Mengistu's case as the primary perpetrators for the crimes of genocide committed in the entire country. The high officials alleged to be responsible for the Rwandan genocide were handled over to the international tribunals in Arusha, including the interim prime minister of the country during the days of the genocide and other military officials. Even when Rwanda rejected the Security Council resolution for the establishment of the tribunals, it did not go back to charge these high level suspects of the genocide by its weak and inexperienced domestic courts, rather the primary responsible defendants were prosecuted by international tribunal that were well experienced and exclusively set up to handle these cases only.

Therefore, comparing the Ethiopian government's action in Mengistu's trial with its Rwandan counterpart, which has more resemblance than the rest of genocide prosecutions, we can easily see the variation in the level of attentions given by the two governments in a similar prosecution endeavor. Surprisingly the numbers of victims killed in the Derg regime²⁷⁸ were even bigger than the number of victims killed in

²⁷⁸ Some people claims that the number of people killed in the Derg regime gets close to 2 million. People that have died due to the country's economic policies and strategies are sometimes considered to constitute part of the general victims in the country by the Derg regime. The issues surrounding the numbers of victim

Rwandan genocide although the amount of efforts made by the Ethiopian government is much lesser than the Rwandan government in their exertion to the prosecution process.

Mengistu's genocide trial using Tiba's words is a classical example of 'delayed justice'. Some of the reasons for the delay were not solely the actions of the two parties before the court. The trial court and the judicial structure of the country in general have contributed as well for the 'tortoise walk' evident in the case. The manners through which the trial court and the judiciary shared this blame in this worldly acknowledged delay are outlined above.

The above mentioned reasons, which counted the government and the entire judiciary as the faulty party for the delay in Mengistu's trial, shall be used to constitute grounds which prejudicially affected the speedy trial right of the defendants in the case. This is because the government and the judiciary had every authority and opportunity to rectify those things that contributed for the delay. And also they could have achieved a genocide trial which was fair and just when they protect and respect the rights of the accused in addition to prosecuting historical crimes. Individuals should go to courts to demand their rights than the courts and the judiciary contributing to the violations.

5.3.2 The Special Prosecutor's Office, SPO

Second to the court and the government, the SPO had a hand in the uncommon delay seen in Mengistu's trial. SPO was established by proclamation 22/1992 along with all the necessary powers to investigate and prosecute Col. Mengistu Hailemariam and his officials for country wide human rights violations during his time in power. The establishment of the prosecutor office was based on the government's policy to attribute

in the Derg regime however suffer a great deal of debate but one thing is clear that many have died in the 17 years of communist era.

criminal responsibilities for those who were considered responsible for the genocide. Besides prosecuting these persons, the SPO and the entire genocide trials were intended to record the historical accounts of the crimes and the violations. In addition to carry out proper prosecutions and to record the accounts, the SPO had counted 2000 witnesses in Mengistu's trial alone.

It had taken almost two years for the SPO to bring its charges against the highest member of the Derg. 2000 witnesses and countless number of documents were brought to incriminate the defendants in 211 counts of genocide and crimes against humanity. Obviously all of the defendants in Mengistu's file were in the top tiers of the regime and were in fact accused of giving different policy and decisions for the extermination of political groups. Or in another way the accusation was based on collective responsibility for being members in the Derg and WPE; the council and the party that were alleged to have made decisions which constituted crimes of genocide and other human rights violations. Scores of documents were available for the SPO to substantiate its prosecutions, since the Derg had kept its decisions as public communications part of state records²⁷⁹.

The SPO for the first half of the trial was occupied with trying to prove the criminal responsibilities of the defendants. It is understandable for the SPO to have faced some difficulties in the process to achieve proper convictions, because of various reasons. Some of these reasons are important here, since they caused the trial to progress slowly and eventually contributed for the delay.

²⁷⁹ See Tiba, Firew, The Mengistu Genocide Trial in Ethiopia, *Journal of International Criminal Justice* 5, 2007, page 513-528, page 519, and also one can approve such claim by reviewing the case and the decision of the court.

It is not an easy task to prove international crimes, as it is in fact difficult, because international crimes like genocide are frequently the results of different of acts which later gave rise to the death large number of people.²⁸⁰ This difficulty is naturally linked to the complexity of the crimes themselves, and one might clearly understand the practical difficulties of the task also when it is tried to be handled by national courts and prosecutors. To attest the validity of this conclusion, brief evaluation of SPO's capacity and its actions in Mengistu's file might be enough for now.

The SPO had its own public prosecutors exclusively assigned to handle genocide cases and also the office is empowered to investigate the crimes to properly do the job. Institutionally this office had a shortage of prosecutors relatively to the task planned and on top of that the qualifications of the prosecutors were clearly a reason to cause delays. The numbers of prosecutors in the office were not sufficient to engage in intricate and time consuming investigations along with prosecuting task. On the one hand, investigation requires its own expertise and qualifications, which were not within the grasp of Ethiopian prosecutors and on the other hand the education qualification of the prosecutors for the effective prosecution is in itself still a question begging.²⁸¹ All prosecutors in Ethiopia passed through the same type of education in the university, no specialization on criminal laws, and apparently no trainings on investigation process and prosecuting skills. Such challenge still works for those who actually have degrees in law,

²⁸⁰ R. May & M. Wierda 'Evidence before the ICTY' in R. May et al(eds)(2001) *Essays on ICTY Procedure and Evidence*, 250, mentioned also in Hailegabriel, Debebe, Prosecution of Genocide at International and National courts: A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/Rwanda', a dissertation submitted in partial fulfillment of the requirements of the degree LLM (Human Rights and Democratization in Africa), Faculty of Law, University of Pretoria, 2004, page 32

²⁸¹ According to Ato Solomon Emiru the number of prosecutors in Mengistu's case was simply enough, but if one evaluates their number to the number of genocide cases in the entire country, even in Addis Ababa, this assumption can be challenged as inadequate.

yet some of the prosecutors who involved in the investigations and the prosecution of Mengistu's trial did not even had first degree in law. Obviously the SPO had limitations on the qualifications²⁸² of its prosecutors on the general law let alone specialization on genocide and crimes against humanity and on investigation abilities. Because qualification certainly matters for this big task and here it can be said that it actually contributes for the slow progress manifested in the trial. On top of these some of the prosecutors who eventually became at least familiar to the facts in the case have left in search of other endeavors. The effects of all of the above problems materialized in many instances during the trial, as once due to problems related to investigations by SPO the trial was suspended for some time and many times SPO failed to furnish witnesses as planned²⁸³.

Additionally, strict consideration of the ways the charges were framed in Mengistu's and other genocide cases in the country could allow us to see more the inexperience aspect of SPO and its failed strategy that caused delays in Mengistu's and other genocide trials.

The SPO joined 74 defendants in one case for 211 counts of criminal commissions, and for this it had brought 2000 witnesses and thousands of documents. Joinder of cases and defendants are allowed in the Ethiopian criminal procedure code²⁸⁴. However, the whole objective of joinder is to serve justice swiftly, when handling crimes that were committed by the same people and in the same set of actions. Hailegabriel in his thesis discussed the

²⁸² Knowing the limited qualifications and experience of Ethiopian judge, prosecutors and lawyers in the trial, the staggering progress of the trial should certainly be understood in connection with the level of qualification of the parties. The genocide trials concluded by international tribunals benefit from the best qualified judges, prosecutors and defense lawyers they have on the trials unlike the Ethiopian professionals.

²⁸³ Hailegabriel, Debebe, *Prosecution of Genocide at International and National courts: A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/Rwanda*, a dissertation submitted in partial fulfillment of the requirements of the degree LLM (Human Rights and Democratization in Africa), Faculty of Law, University of Pretoria, 2004, page 35

²⁸⁴ Article 116 and 117 of the criminal procedure code of Ethiopia.

benefits of joinder of cases and accused, as to include saving of time, costs and also to protect witnesses and victims from making repeated journeys and give the same testimonies again and again. As a conclusion he said that principle of joinder should only be applied, if it is a good way to accomplish the above benefits and when it is not against the interests of the defendants²⁸⁵. It is no doubt that joinder of cases and accused is an effective way and has many advantages. But for crimes like genocide and crimes against humanity, joinder of cases and accused should also be read along with the possibility of identifying certain actions of the accused that could be enough to secure convictions. Rather than to bring 211 counts of genocide along with 2000 witnesses and thousands of documents, which is obvious to cause much more time as opposed to save time and costs for the defendants and for the prosecution itself. All of the genocide trial in the world did not try to bring all things together that have been committed by the defendants'.²⁸⁶

In addition to this, joinder cases caused several practical delays in Mengistu's trial, when some defendants failed to appear before the court, when a prosecution witness came to testify. The court many times postponed the hearing, because all of the defendants have to be present to conduct cross examination either personally or through counsels²⁸⁷.

Besides to these practical problems of joinder cases the SPO claimed to prove collective criminal responsibilities of the defendants based on their capacity as members of the Derg

²⁸⁵ Hailegabriel, Debebe, *Prosecution of Genocide at International and National courts: A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/Rwanda*, a dissertation submitted in partial fulfillment of the requirements of the degree LLM (Human Rights and Democratization in Africa), Faculty of Law, University of Pretoria, 2004, page 30

²⁸⁶ Nuremberg, ICTY, ICTR and the trial of Adolph Eichmann efficiently designed to secure conviction swiftly than to prove so much guilt by bringing myriad counts of crimes which will make the entire prosecution hard and to tedious.

²⁸⁷ This was also mentioned in Hailegabriel article. See Hailegabriel, Debebe, *Prosecution of Genocide at International and National courts: A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/Rwanda*, a dissertation submitted in partial fulfillment of the requirements of the degree LLM (Human Rights and Democratization in Africa), Faculty of Law, University of Pretoria, 2004, page 32

and WPE. Sarkin, however, believes that prosecution based on collective criminal responsibility by itself creates delay.²⁸⁸ Therefore, Mengistu's trial apart from all the other reasons that caused its lengthy trial suffered delay, because the SPO brought its charges expecting convictions based on the collective responsibilities of all the defendants.

Experiences of other countries, including the Rwandan and the Nuremberg trials is similar on the need to bring collective responsibility against the respective defendants. Yet they were clearly different from Mengistu's trial on the amount of time spent to finalize the prosecutions. SPO and the government cannot justify the delay duly acknowledged in Mengistu's trial based on issues related to the difficulty to prosecute defendants on collective responsibilities. Collective responsibilities creates also another problem related to the possibility of assuming inappropriate responsibilities against those defendants under custody particularly when the ones that are tried in absentia are the supreme leader of the defendants.²⁸⁹

As mentioned above, the SPO and the trial court was expected to record the historical account of the crimes as it were revealed in the process. In order to document these histories the SPO relentlessly accumulated large number of witnesses and evidences to tell the stories even some or many of them could say the same things. 2000 named

²⁸⁸ Sarkin, Jeremy, the tension between Justice and reconciliation in Rwanda: politics, human rights, due process and the role of the Gacaca court in dealing with genocide, *Journal of African Law*, vol. 45, no. 2 (2001), page 143-172, Cambridge University Press on behalf of the School of Oriental and African Studies.

²⁸⁹ Therefore, collective responsibility creates delay in a case, because collective responsibility by itself is very complex and complicated to prove against all named defendants and also for defendants under custody collective responsibility condemns them to suffer delay when the prosecutor brings all evidences against persons who are tried in absentia. See also Hailegabriel, Debebe, *Prosecution of Genocide at International and National Courts: A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/Rwanda*, a dissertation submitted in partial fulfillment of the requirements of the degree LLM (Human Rights and Democratization in Africa), Faculty of Law, University of Pretoria, 2004, page 31.

prosecution witnesses planned to appear in Mengistu's case to testify against the defendants and also to share their unfortunate memories for the sake of the historical recordings as well. The trial court did not however, allowed or needed to hear all of these witnesses; rather it heard only the testimonies of 825 prosecutor witnesses.

Historical recording aspect of the trial was linked to the eventual publication of the final judgments of the case for public consumption. Ethiopian courts briefly mentioned the testimonies of witnesses of either side on their final judgment to show the logical structure which led the court to the decisions. So far Ethiopian courts have yet to have their own official outlets to publicize their judgments. Apart from brief news episodes on the judgment of Mengistu's trial and public discussion of the outcome, it will be hard to say the public is fully informed of the details of the testimonies as it was one of the objectives of the entire prosecutions process.²⁹⁰ Therefore, Mengistu's trial was condemned to suffer unnecessary delay by allowing large number of witnesses to testify the same and/or similar things for many times due to a policy that could not even accomplished at the end.

One of the logical reasons for a quite ambitious effort of the SPO in the number of witnesses, besides its responsibility to document the crimes as historical accounts, was the absence of complete evidence law in Ethiopia. There are in fact some rules dispersed in different Codes and proclamations of the country which by itself demand a lot of work of the court.

²⁹⁰ Tiba, Firew, The Mengistu Genocide Trial in Ethiopia, *Journal of International Criminal Justice* 5, 2007, page 513-528, page 513.

“In administering issues of evidence, rules of evidence play great roles either by facilitating or hindering the proceeding”²⁹¹. Hailegabriel in article clearly identified this issue as a great problem in criminal prosecutions in Ethiopia generally and particularly in the genocide trials including Mengistu’s. Judges in Ethiopia do not make rules of evidence, which ensures swift trial and their responsibility in admitting the types and number of evidence basically depends on the will of the prosecutor and the defendants.²⁹² The international criminal tribunals established to adjudicate the Rwandan genocide and the genocide in the Former Yugoslavian have a provision in their rules of procedure, which empowers the judges to adopt rules of evidence to determine the issues fairly²⁹³. Hailegabriel concluded after, he considered the absence of law of evidence in Ethiopia in the following way;

The Ethiopian judges, like the International Tribunals, do not have the power to cut off irrelevant or repetitive testimony and exclude witnesses whose testimony is cumulative or of no material assistance to resolve the issue at hand. Hence the result has been delays of the proceedings and lengthening of the detention of most of the accused for more than 10 years²⁹⁴.

Another probable cause for delay in Mengistu’s trial will be whether the impartiality and independence of the SPO can constitute a ground which caused delay in Mengistu’s trial. Speedy trial right as one of fair trial right demands independent, impartial and competent

²⁹¹ Hailegabriel, Debebe, *Prosecution of Genocide at International and National courts: A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/Rwanda*, a dissertation submitted in partial fulfillment of the requirements of the degree LLM (Human Rights and Democratization in Africa), Faculty of Law, University of Pretoria, 2004 page 33

²⁹² Ibid, page 34

²⁹³ Rules 89 of the RPE of both ICTY and ICTR provide that ‘ in case not otherwise provided for, a Chamber shall apply rules of evidence which will best favor a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principle of law’

²⁹⁴ Hailegabriel, Debebe, *Prosecution of Genocide at International and National courts: A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/Rwanda*, a dissertation submitted in partial fulfillment of the requirements of the degree LLM (Human Rights and Democratization in Africa), Faculty of Law, University of Pretoria, 2004, page 34

courts²⁹⁵. Similarly the prosecutor office should also have to attain such level institutional arrangement, since its fundamental task is to protect the society through criminal prosecutions. With the same token the SPO and the entire prosecution office of Ethiopia has a lot to answer on the issues of independence, impartiality and competence. The independence requirement might be related to the structure of the public prosecutor being part of the executive or the main political organ of the state. The impartiality is also linked to its structure, but can also be seen exclusively within the realm of individuals appointed to run offices.

The Ministry of justice is the responsible ministry for the actions of the prosecutors and it is also a member of the ministry of cabinet with political power and responsibilities. Mengistu's genocide trial is always challenged as an organized political revenge of the current government against the Derg. These critics make more senses in correlation with consideration of what the Derg and the other opposition political parties²⁹⁶ did while Mengistu's was on power. Therefore, most of these critics actually believe that the delay in Mengistu's trial through the actions of the SPO was a political revenge against the Derg officials, which invokes a big question of the independence of SPO.

Impartiality can also be raised here for the delay, because of the chief prosecutor of SPO was the former member of EPRP²⁹⁷. It is not difficult to understand that impartiality can

²⁹⁵ R. Clayton & H. Tomlinson, *The Law of Human Rights* (vol. I) (2000), page 550

²⁹⁶ TPLF, one of the political parties in the ruling party EPRDF, and the very party that led the civil war against the Derg government. see also Kiss, Edward, *Revolution and Genocide in Ethiopia and Cambodia*, Lexington Books, UK, 2006. All political parties during the civil war caused the death of many lives because of their struggle to win the war. This was a fundamental reason why Kiss and other scholars are not persuaded to categorize politicized as genocide because the victims and the perpetrators played similar role in the killings.

²⁹⁷ EPRP was one of the opposition parties during Mengistu's regime and it was in fact EPRP which declared the White Terror to kill and attack anybody who worked for the Derg government. The Derg

be a problem in the proper conduct of professional works. It will even be complicated when the chief of the prosecutor had personal attachments to the process. Because of this, the defendants in Mengistu's case raised an objection demanding the removal of the chief prosecutor from his position, but the court was not impressed. However, the most important trial of the country was anyway left to be conducted by a prosecutor, who was involved in the heart of power struggle, which eventually led to the death of millions of people. As far as he was appointed the chief prosecutor of SPO, impartiality can be a sound cause for any improper features of Mengistu's trial including delay.

Consequently, the SPO and the prosecutor office can be challenged on independence and impartiality claims which are a limitation for fair trial and human rights of the defendants. Besides, these two challenges have greater potential to cause delay in a case and to some extent they have caused the SPO to run lengthy prosecution in Mengistu's trial.

5.3.3 The defendants

Defendants can also cause delay in a case. The defendants who were under custody for the entire trial time had also contributed to the apparent delay in the case. At first these defendants were charged, because of their membership in the ruling council and the party during Mengistu's regime. Clearly these people were important members of the political machinery of the Communist regime and also they are in fact members of the defeated government. On the other hand, the defendants are the political enemies of the winners, which established and run the new government in general.

Because of this fact, the defendants, which include the former prime minister and vice president and other high officials of the communist government of Ethiopia, rejected the

government then after declared the Red Terror to destroy EPRP and other opposition parties. Many members of the EPRP parties were killed officially, which made them probably the biggest victims in the Red Terror.

legitimacy of the entire genocide trials as a clear political revenge unworthy of defending the charges²⁹⁸.

During the opening of the trial, and in many other instances most of the defendants reflected their ardent rejection of the judiciary and the government via long political speeches. Particularly, when they were asked to make pleas to the charges, almost all of them renounced the court, the ‘false charges’ as they called it and the new government entirely. However, the trial court disregarding their rejections recorded plea of not guilty and allowed the SPO to open its prosecution.

Genocide cases in the world have seen similar denunciation by the respective defendants, especially when the trials are established or supported by governments which had get rid of the ones that stand before courts charged for their actions. Genocide trials in Nuremberg, in Rwandan courts, ICTR, and ICTY had faced similar speeches. Despite loud rejections by defendants in all the above trials and in Mengistu’s trial as well, this method of defense did not save the defendants from eventual prosecutions rather their rejections, however, made it hard for them to bring proper defense against the charges and cost them to go through a lengthy trial which was somehow directly linked to their actions.

Some defendants in Mengistu’s trial manifested their rejections by firing their lawyers provided by the state and chose to defend their case by themselves. Professional legal assistance is very important especially for crimes like genocide and crimes against humanity. Equality of arms is the basic conditions in fair trial rights protection. As it is the obligation of the government to provide professional and quality legal services to

²⁹⁸ See Special Prosecutor v. Col. Mengistu Hailemariam et al., File No 1/87, Ethiopian Federal High Court and from the interviews with the judge and the lawyer revealed such similar incidents.

ensure the proper balance of the trial. The defendants in Mengistu's trial were afforded this service through representations by a number of respectable private lawyers in the country, but some defendants out of their personal grounds, certainly linked to their views on the legitimacy of the trial, chose to terminate the representations.

Rejection might not be the best move when the charges involved are genocide and crimes against humanity, which has life sentence and in special cases death penalty²⁹⁹. But even before all these, those defendants who chose to defend their case doomed themselves and the rest to several delays due to the difficulties to investigate and produce witnesses and evidences operating from prisons. There were many instances where hearings were postponed, because these defendants could not manage to bring evidence and witnesses on time. Defying the authority of the court did not benefit the defendants rather it contributed to the staggering pace of the case that subsequently prejudiced their very defense badly.

Rejection can not avail their individual status here. The court had legally assumed authority on their actions whether they like it or not, whatever interests the incumbent government had.

So far the paper managed to identify considerable number of reasons that can be counted as potential causes for the delay in Mengistu's genocide trial. All of the three parties in the case including the government had played roles that cumulatively made the longest genocide trial in the world. Nevertheless, not all of the reasons had legitimate justifications or were reasonable, because they were impossible to be rectified by the court and the government. Therefore, the paper in the conclusion part shall decide on the

²⁹⁹ Article 281 of the Ethiopian Penal Code.

reasonableness of these reasons which caused the delay vis a vis the speedy trial right of the defendants. But next the paper shall apply the third part of the test to identify whether the defendants claimed their speedy trial.

5.4 The Third part of the test

The third part of the test will try to identify the specific occurrences where by the defendants claimed their rights to speedy trial protection in the process. This part of the test attempts to bring into light the instances where by an accused asserts her/his speedy trial right invoking the alleged delay in the case. Such definite defense allows the defendants to bring a motion demanding the dismissal of the charges, when the case suffers delay which detrimentally affects their defense. The US Supreme Court relates assertion of the right to speedy trial with a demand doctrine where by the defendant is supposed to bring all defenses that shall benefit her/his case. Otherwise, failure to do so shall be used as renunciation of the privileges to benefit from speedy trial right.

Once the case was brought to the court the defendants had no choice except to defend what is brought against them. And obviously they should bring their best defense; one of the best defenses was to demand a remedy against the delay invoking the same as a ground for dismissal. The purpose of this defense is as argued by the US court is to profit from speedy trial claim by showing the delay is affecting her/his ability to bring proper defense. In Mengistu' trial the delay was a great deal of issue, as some of the defendants and lawyers of defendants repeatedly raised the delay as a limitation in the whole trial³⁰⁰.

Some defendants fairly informed the court on the difficulty to conduct proper defenses against the prosecutions considering the amount of time the trial had taken and the

³⁰⁰ According to the interviews with a judge and a lawyer in the trial such kind of defense was raised several times.

number of years passed from the alleged crimes. Some even go further to demand the right to be tried within reasonable time, as it is a constitutional right in Ethiopia.

Collective responsibilities in criminal case intend to prove the participation of the defendants by certain evidence brought in the case. Any type of evidence and witness brought against a particular person from the defendants can be a ground to prove participation of the whole. Similarly any type of defense and evidence produce by one defendant should benefit the whole defendants, since the charges attribute collective criminal responsibilities against all. Therefore, even if not all of these defendants raised a defense demanding the dismissal of the charges due to the delay, the defense raised by some should be interpreted to benefit all. Beside the Barker court understood renunciation or waiver as intentional relinquishment or abandonment of known rights or privileges.

5.5 The Fourth part of the test

The last part of the Barker test seeks to identify specific prejudices the delay has caused the defendants in the trial. As repeatedly mentioned in the earlier parts, speedy trial right is a guarantee to protect an accused from prejudices negatively affecting her/his ability to properly defend prosecution. Hence, this last part is very important part of the test, because any remedy due for defendant's claim actually exists to protect such prejudices that are in one way a violation of the speedy trial right due to the delay and in other way because violation of speedy trial allows the violations of other rights.

Additionally, prejudices due to delay affects the prosecutor's ability to bring efficient criminal prosecutions through proving its case beyond reasonable doubt.³⁰¹ Therefore, the

³⁰¹ Justice O'Connor in her dissenting opinion in defense argued that delay highly affects the prosecutor more than the defendants since the prosecutors have to prove beyond reasonable doubt to secure conviction. She said that "delay is a double sided sword which would hurt the government's prosecution just as much

evaluation of prejudices due to delay should also include consideration of prejudices against the prosecution in addition to the defendant's. In this last part of the test the paper shall try to identify if the two parties who are vulnerable to suffer prejudices, because of delay actually suffer prejudices and, if they do what kind and finally what should be the proper remedies for these prejudices. But, first let us first focus on the prejudices of the defendants'.

The most fundamental prejudice of delay protected by speedy trial right is the loss of material defense witnesses and evidence. Such prejudice affects the defense to be weak and venerable potentially leading to undeserved convictions. Loss of liberty from indefinite incarceration without conviction, anxiety due to this lengthened trial and vulnerability to collective blames by the society are the other prejudicial effects of delay.

Most of the defendants in Mengistu's genocide case were jailed for more than the time of the trial. The defendants and the SPO had made their own investigations to look for evidence that will substantiate their cases respectively. However, the delay is a great problem here to succeed in this endeavor. Witnesses might die, go out of the country and might even be difficult to know where they are now to give testimonies on decisions and policies made more than 20 or more years ago. SPO was the least affected party in this situation, the decisions and policies of the Derg were state records which were easy to collect. In fact SPO brought ample evidence and witnesses to the trial. Besides, the SPO had appropriate budget and mandate to carry out necessary investigations to accumulate the evidence. All of the expenses for the prosecution witnesses were paid out by the

as the defendant." See dissenting opinion by Justice Barbara O'Connor in *Dogget v. United States*, 112 S. Ct. 2686, 1992.

government from the budget bequeathed for the courts,³⁰² and this budget was enough even to bring experts far from Argentina to examine exhumed bodies.³⁰³ SPO had no financial problems and difficulty to find witnesses; rather it had brought witnesses and evidence through government funds apportioned to these activities. Therefore, the prejudicial effects of the delay in the case at least in connection to the availability of evidence and witnesses could not be said to have affected the prosecutor's case considerably or even to small extent.

However, these facts did adversely affect the defendants' ability to look for and summon witnesses on their behalf. Apparently this lengthy trial added more years to the age of the alleged crimes that even made all the investigations by the defendants in search of witnesses more complex and intricate. SPO had professional assistance to examine evidence. Nevertheless similar activities that should have been inspected by respective experts in support of the defense were left to be handled by either the defendants or by their lawyers. This predicament put down the defense to engage themselves or their lawyers into very somber tasks, in addition to paying all the costs through the process.³⁰⁴

The disturbing aspect of this situation is that, as long as the trial progressed slowly, the chance to succeed in the search depends upon individual's capacity to cover all expenses within a diminishing possibility to accomplish.

³⁰² Hailegabriel, Debebe, *Prosecution of Genocide at International and National courts: A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/Rwanda*, a dissertation submitted in partial fulfillment of the requirements of the degree LLM (Human Rights and Democratization in Africa), Faculty of Law, University of Pretoria, 2004 page 28, see also the budget schedule for the Federal Supreme Court of Ethiopia

³⁰³ Tiba, Firew, *The Mengistu Genocide Trial in Ethiopia*, *Journal of International Criminal Justice* 5, 2007, page 513-528, page 519

³⁰⁴ Hailegabriel, Debebe, *Prosecution of Genocide at International and National courts: A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/Rwanda*, a dissertation submitted in partial fulfillment of the requirements of the degree LLM (Human Rights and Democratization in Africa), Faculty of Law, University of Pretoria, 2004 page 28

Generally the defendants in Mengistu's case had to cover all the costs to bring a defense witness, even when the constitution recognizes the accused's right to have evidence produced in their own defense and to obtain the attendance of and examination of witnesses on their behalf before the court.³⁰⁵ All of the defendants had no or limited direct income, which made it impossible to pay for the investigations, however, this limitation did not curb most of the defendants in Mengistu's file to attempt the investigation. With all the limited resources by the defendants, their efforts could not achieve results in due time and many of the attempts fell short, because finding evidence was too costly and many potential witnesses were not available.³⁰⁶ If the SPO had problems related to collection of evidence in 2000 which caused the suspension of the trial, it will be easy to understand the prejudice affecting the defendants' efforts to gather defense evidence.

Some of the defense witnesses died before they were able to take the stand on behalf of defendants. The cause of the deaths might be different, but for the large number of the witnesses it was natural. This is particularly true for many of the witnesses who would have testified about the country's political situations in the 1970s; years that were taken as the fundamental time frame for most of the alleged crimes.³⁰⁷ One thing was seen here, regardless of the problems we had seen so far the defendants had actually brought certain

³⁰⁵ Article 20(4) of Ethiopian constitution, '[A]ccused persons have the right to ... have evidence produced in their own defense, and to obtain the attendance of and examination of witnesses on their behalf before the court'.

³⁰⁶ Many people fled out of the country due to fear of reprisal by the new government in connection to their works during Mengistu's regime. Some defendants named people who are currently living out of the country; some colleagues who are also accused in the same file or in another but under prosecution in absentia and some whose whereabouts is not known to the government or to the defendants too.

³⁰⁷ The country has one of the smallest life expectancy in the world and additionally it is in the midst of a lot of natural and manmade problems that simply contribute to shorten the lives of many people.

witnesses, but the credibility was challenged many times due to long years since the commission of the crimes.

In addition, to the death of witnesses some defendants also died before judgment.³⁰⁸ The delay contributes for the late defendants, as to lose their last years of life in anxiety by remaining in jail without convictions.³⁰⁹ The trial did not serve justice for the defendants except being too tedious and abusive. Moreover, it failed to achieve justice for the society, when some individuals escaped responsibility, because the prosecution was not realized quickly to be enjoyed by society as they waited eagerly for many years. Similarly this kind of objection is often raised against International Criminal Tribunals for the former Yugoslavia in the Milosevic case³¹⁰.

When the defendants became fortunate to find witnesses to testify on their behalf some witnesses were not fully supportive at all. “There are (were) instances whereby the defense witness turn(ing) out to be prosecution witness and testify against the accused... (*additionally*)... It is common to see questions raised that support the case of the prosecution rather than defense of the accused”.³¹¹ The government, however, provides all the defendants who wished to have legal representation at least in Mengistu’s case with experienced private lawyers. But the qualification of these lawyers is similarly

³⁰⁸ Ato Teka Tulu, a high ranking Derg official and members of Mengistu’s ministerial cabinet died of heart attack while he was still in prison.

³⁰⁹ Stronger challenge can arise here based on the right to be presumed innocence. This could be a good research issue for the future.

³¹⁰ Milosevic died in prison before the court decides the charges against him. Some critic even used this situation to attack the reliability of ICTY and its objectives. Similarly this criticism can also be raised against mengistu trial since many have died through long process that has failed to achieve justice in due time.

³¹¹ Hailegabriel, Debebe, *Prosecution of Genocide at International and National courts: A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/Rwanda*, a dissertation submitted in partial fulfillment of the requirements of the degree LLM (Human Rights and Democratization in Africa), Faculty of Law, University of Pretoria, 2004 page 26. See also Tiba, Firew, *The Mengistu Genocide Trial in Ethiopia*, *Journal of International Criminal Justice* 5, 2007, page 513-528, page 519

challenged like the judges and the prosecutors on the lack of specialized training on genocide and crimes against humanity. Tiba saw the problems relating to legal representation in Mengistu's trial in the following way,

“The trial besides being overly lengthy was characterized by several logistical problems. The degree to which the defendants were afforded appropriate legal counsel has been a matter of great concerns to everyone including the judges.”³¹²

Tiba, however, was too modest only to see such challengeable defense as a logistical problem. Rather if one actually sees this fact from the rights perspective in general³¹³ or from fair trial rights side particularly, this problem will definitely be more than a logistical problem.

The other prejudices of uncommon delay are anxiety and unnecessary public accusation. Defendants are protected from anxiety and public accusation on speedy trial rights; but, Mengistu's trial did not seem to be bothered by these two interests. The trial undoubtedly created anxiety and accusation not only to the defendants, but to their families as well, and it made them to suffer never ending prejudices, because of never ending trial.

Delay creates unnecessary results impairing the sense of justice of the society. The prejudicial effects of delay against society refute its aim to secure justice through appropriate prosecution as a way of rectifying the historical violations. This prejudice can include a failure to achieve proper punishment against perpetrators, who had committed violations against the society. In addition to this, the society might even lose faith on the entire system including the judgment due to delay. For instance, victims and family of the victims were not happy about the sentences, when the High court considered the length of

³¹² Tiba, Firew, The Mengistu Genocide Trial in Ethiopia, *Journal of International Criminal Justice* 5, 2007, page 513-528, page 527

³¹³ The right to have a Legal representation is a right recognized under ICCPR and under Ethiopian constitution in article 20.

trial as a mitigation ground and passed what it considered a reasonable punishment against Mengistu and his officials by sentencing them to life imprisonment³¹⁴. Many of them had expected capital punishment at least for those who are on the top of the hierarchy.³¹⁵

³¹⁴ Sentencing judgments, Special Prosecutor v. col. Mengistu Hailemariam et al., file No. 1/87, Ethiopian Federal High Court, 11 January 2007. Amharic version is available on a weekly newspaper at <http://www.ethioianreporter.com/module.php?name=News&file=article&sid=11310>., visited on September 27, 2009.

³¹⁵ Interviews with families of the victims and representatives of the victims group, in Amharic, <http://www.ethioianreporter.com/module.php?name=News&file=article&sid=11328>. See also <http://www.ethioianreporter.com/module.php?name=News&file=article&sid=11327>, visited on September 27, 2009.

Chapter Five

Conclusion

The right to fair trial is a fundamental guarantee, important for the enforcement of a number of individual rights. Its protection subsequently ensures the protection of other rights as rights are interdependent and interrelated to each other. Similarly, the violations of fair trial inevitably draw the violations of the other rights.

Right to speedy trial or the right to be tried within a reasonable time is a recognized right of an accused by international and constitutional provisions in Ethiopia. However, it is common to see large number of cases taking too many years before final judgments. Ethiopian courts in one hand do not have a neutral test to guarantee speedy trial in addition to many other reasons to cause delays. Therefore, this judicial test is important for courts first to understand the specific guarantees of the right and to protect it from violations. Under this study, attempts have been made to show the need to start using a test by Ethiopian courts to resolve delays after discussing the specific protections of the rights, the violations, the effects of the violations, the remedy and manner to apply the components of the test vis-à-vis an actual case.

Mengistu's genocide case lasted for more than 12 and 2 months. The study using the Barker test found out this case had actually suffered uncommon or extraordinary delay severely prejudicial to the defendants. Uncommon delay furthermore relieves the defendants to show the specific prejudices due to the delay. Although sheer detection of uncommon delay could not secure outright dismissal of the charges, but the causes for the delay must have come from the prosecution than the defendants.

Mengistu's genocide case suffered this extraordinary delay due to the actions of all three parties plus reasons related to the prevailing system in the country. The judicial does not assign a special bench exclusively for the case, the experiences and competence of the judges is still an issue, the case had seen so many judges coming and going which obviously added more time and even those that were on the bench were burdened to handle other similarly important cases and some still presided in circuit benches.

The SPO had clear problems regarding its experiences especially its qualifications to handle crimes like genocide and crimes against humanity alleged to have been committed more than two decades ago. Some prosecutors did not even have first degree in law. The SPO bogusly brought too many criminal counts as opposed to selecting few to secure effective and swift convictions. Beside it was responsible causing the case to be suspended in 2002 due to problems related to collecting up evidence. Surprisingly enough the SPO also caused some valuable time of the court by bringing massive number of evidence and witnesses to prove similar things over and over again. Finally the independence and impartiality aspect of the SPO itself seemed questionable, sufficient enough to cause the slow pace and eventual delay in Mengistu's trial.

Furthermore, the defendants had also contributed to the staggering move of the trial. Around the beginning of the trial some defendants had aired their rejections of the trial by attacking and denying the legitimacy and the moral imperatives of the new government to institute criminal prosecutions against them. By rejection the trial they even refused to respond to the charges and make pleas. Unfortunately, denial did not achieve anything more than to slow the trial.

Apart from the three parties the government had as well contributed for this uncommon delay. Government's policy to record historical accounts of the killing allowed as many witnesses and evidence available to testify even if it was immaterial for prosecution. The country does not have a comprehensive law of evidences which defines what and which type of evidences are admissible to courts. The absence such law forces a trial to face any kind of evidence regardless of its importance to the issues at hand. Mengistu's genocide case is a victim to this situation when the court allowed more than 800 witnesses to testify. The state did not finance the defendants to made necessary investigations the way it did to the prosecution. Generally the government contributes to the delay by failing to fulfill its entire human rights obligations agreed in international human rights instruments.

The consequence of the reasons is seen via making the trial one of the lengthiest genocide trial in the world. The eventual delay was in fact prejudicial to both the defendants and the prosecutors. However, the study found out that the delay did in fact detrimentally impinge on the defendants than the prosecution. The defendants had a lot of problems to investigate and gather evidence due to the delay that made investigation of crimes alleged to be committed 20 years ago impossible. On one hand the state did not fund such activities and on the other even if they paid the expenses by themselves the lengthy trial made the investigation too expensive. When the work became impossible some defendants then plead for support from government through writing a letter to the prime

minster.³¹⁶ If the SPO had problems to gather up evidence, the defendants must have been massively inhibited then.

In conclusion, Mengistu's trial has suffered uncommon delay recognized even by the trial court itself by causes contributed by the three parties and the government. However, the respective weights that should be given to the causes shall not out run the clear prejudices the defendants had suffered. Because of this, the causes that are due from the trial court, the prosecutors and from the government weights a lot more than the rejections the defendants had shown, which did not even cause suspension of the trial. After all, the Bill of Rights protects individuals than the government³¹⁷.

Therefore, the 12 years and 2 months trial of Mengistu's genocide trial has clearly violated the right to speedy trial of the defendants and such violation also allows the entire prosecution to violate other individual trials of the defendants. Due to this the judgment that was reached as a result of violations of the right to fair trial of the defendants cannot and should not be considered legitimate.

³¹⁶ Kiss, Edward, *Revolution and Genocide in Ethiopia and Cambodia*, Lexington Books, UK, 2006. Page 104

³¹⁷ Wernikoff, M. Steven, Sixth Amendment-Extending Sixth Amendment Speedy Trial Protection to Defendants Unaware of their, *The Journal of Criminal Law & Criminology*, Vol. 83, No. 4 Copyright, 1993 by Northwestern University, School of Law Printed in U.S.A, page 819

Bibliography

Books

1. D.J. Galligan, Due Process and Fair Procedures, A Study of Administrative Procedures, Clarendon press, oxford, 1999
2. Faith, Thompson, Magna Carta: its role in the making of the English constitution 1300-1629, Published by READ BOOKS, 2007, page 68 to 99. s, Thorne, w. Dunham, p. Kaarland, and I Jennings, the great charter: four essays on magna Carta and the history of our liberty (Pantheon, New York, 1968)
3. Kiss, Edward, Revolution and Genocide in Ethiopia and Cambodia, Lexington Books, UK, 2006.
4. Nahum, Fasil, constitution for a nation of Nations, the Ethiopian prospect, 1997, the Red Sea Press Inc, Asmara, Eritrea.

Cases

1. Klopfer v. North Carolina, 386 U.S. 213 (1967)
2. United States v. Ewell, 383 U.S. 116 (1966)
3. United States v. Marion, 404 U. S. 307 (1971)
4. Strunk v United States, 412 US 434, 37 L Ed 2d 56, 93 S Ct 2260
5. Barker v. Wingo, 407 U.S. 514 (1972)
6. Doggett v. United States, 112 S. Ct. 2686, (1992).
7. Commonwealth v. Clark, 443 Pa. 318, 279 A.2d 41 (1971),
8. William Marbury v. James Madison, Secretary of State the United States, Supreme Court 5 U.S. 137 February,

9. United States of America v. Alstötter et al. 3 T.W.C. 1 (1948), 6 L.R.T.W.C. 1 (1948), 14 Ann. Dig. 278 (1948).
10. Gonzalez Del Rho v. Peru, Communication No. 263/1987, U.N. Doc. CCPR/C/46/D/263/1987 (1992).
11. Prosecutor v. Kambanda former (prime minister of the country during the genocide), (case no. ICTR-97-23-s),

Laws and Reports

1. Proclamation for the Establishment of Federal Courts Proclamation# 25/1996,
2. Federal Democratic Republic of Ethiopia Constitution, proclamation #1,1995
3. Proclamation for Defining the law making process of the House of Peoples' Representative, Proclamation # 14, 1996
4. Penal Code of the Empire of Ethiopia of 1957, proclamation # 158 of 1957.
5. Proclamation for the Establishment of the Special Prosecutors Office, Transitional Government of Ethiopia, Proclamation No.22/1992
6. International Convention for Civil and Political Rights, ICCPR, International Covenant on Civil and Political Rights, adopted by the UN General Assembly Resolution 2200A (XXI) 16 December 1966, entered into force 23 March 1976
7. International Convention for Economic, Social and Cultural Rights, ICESCR
8. Convention on the Prevention and Punishment of the Crime of Genocide Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948 *entry into force* 12 January 1951, in accordance with article XIII
9. Convention Against Torture, CAT

10. Convention on the Elimination of all forms of Discrimination Against Women, CEDAW
11. Statute of International tribunal for Rwandan, Security Council resolution for the establishment of the tribunal, Security Council resolution S/RES/955, 6 November 1994
12. UN Security Council 3217th meeting Resolution S/RES/ 827, May 25, 1993 for the establishment of International Criminal Tribunals for the Former Yugoslavia
13. ICTY Rules of Procedure and Evidence, adopted 11 February 1994 and as finally amended 17 July 2003
14. ICTR Rules of Procedure and Evidence, adopted 29 June 1995 and as finally amended 27 May 2003
15. General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial Human Rights Committee, Ninetieth session, Geneva, 9 to 27 July 2007
16. Draft Third Optional Protocol to the ICCPR, Aiming at Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy, Annex I, in: “The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening,” Final Report, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Session, /CN.4/Sub.2/1994/24, June 3, 1994.

17. African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.
18. Constitution of the United States of America
19. The Speedy Trial Act of 1974, 88 Stat. 2080, as amended August 2, 1979, 93 Stat. 328, is set forth in 18 U.S.C. §§ 3161-3174
20. Republic of Rwanda, 'loi organique no. 8196 du 30/8/96 sur l'organisation des poursuites des infractions constitutives du crime de genocide ou de crimes contre l'Humanite, comimise a partir de 1^{er} octobre 1990' official gazette of the republic of Rwanda(1 September 1996)
21. United Nations Security Council Resolution 955, adopted on November 8, 1994
22. Legal vice presidency the World Bank, report on Ethiopian legal and judicial sector assessment, 2004.
23. U.S Congress, Senate Committee on Foreign Relations, Ethiopia and the Horn of Africa: hearing before the sub-committee on African Affairs, 94th Congress, 2nd session, August 4-6, 1976.

Articles and Journals

1. Destexhe, Alain, The Third Genocide Source: Foreign Policy, No. 97 (Winter, 1994-1995), Published by: Carnegie Endowment for International Peace
2. F. D. L. Jr, The Lagging Right to a Speedy Trial: Source: Virginia Law Review, Vol. 51, No. 8 (Dec., 1965),pp. 1587-1620 Published by: Virginia Law Review
Stable URL: <http://www.jstor.org/stable/1071650> Accessed: 13/03/2009.

3. Francis C. Amendola, et al. Time of trial; Right to speedy trial, B. Constitutional Guaranty of Speedy Trial, Corpus Juris Secundum, Database update June 2008
Herman, Susan N, The Right to a Speedy and Public Trial: A Reference Guide to the United States Constitution, , Greenwood Publishing Group, 2006.
4. Ferencz, Benjamin B. Inside the Nuremberg Trial: A Prosecutor's Comprehensive Account. by Drexel A. Sprecher Source: The American Journal of International Law, Vol. 93, No. 3 (Jul., 1999), pp. 760-761
Published by: American Society of International Law
5. Haile, Daniel, 'Accountability for the Crimes of the Past and the Challenges of Criminal Prosecution; The case of Ethiopia' (2000) *Leuven Law Series* 42
6. Jescheck, Hans-Heinrich, The Discretionary Powers of the Prosecuting Attorney in West Germany, Source: The American Journal of Comparative Law, Vol. 18, No. 3 (Summer, 1970), pp. 508-517 Published by: American Society of Comparative Law Stable URL: <http://www.jstor.org/stable/839342> Accessed: 19/03/2009
7. Jimmie E. Tinsley, Prejudice Resulting from Unreasonable Delay in Trial, , J.D. American Jurisprudence Proof of Facts 2d, Database updated July 2008
8. Lauren Johnson, Human Rights and Democratic Reform: The Challenge of Reconciliation in South Africa and Rwanda After Apartheid and Genocide, November 13, 2008, INTS 4501-Comparative Politics in the 21st Century, Dr. Lynn Holland, Autumn 2008
9. M. Redae 'The Ethiopian Genocide Trial' (2002) 1 *Ethiopian Law Review*

10. Phil Clark and Zachary D. Kaufman, Introduction and background, After genocide, transitional justice , post conflict reconstruction and reconciliation in Rwanda and beyond, edited by Phil Clark and Zachary D. Kaufman, page 31, published Hurst and company, London, 2008
11. R. Clayton & H. Tomlinson, The Law of Human Rights (vol. I) (2000) 550
12. R. May & M. Wierda 'Evidence before the ICTY' in R. May et al(eds)(2001) Essays on ICTY Procedure and Evidence
13. Sarkin, Jeremy, the tension between Justice and reconciliation in Rwanda: politics, human rights, due process and the role of the Gacaca court in dealing with genocide, journal of African law, vol. 45, no. 2 (2001), page 143-172, Cambridge university press on behalf of the school of Oriental and African studies.
14. Tiba, Firew, The Mengistu Genocide Trial in Ethiopia, Journal of International Criminal Justice 5, 2007, page 513-528.
15. Uviller, H. Richard, Barker v. Wingo: Speedy Trial Gets a Fast Shuffle, Columbia Law Review, Vol. 72, No. 8 (Dec., 1972), pp. 1376-1402, Published by: Columbia Law Review Association, Inc. <http://www.jstor.org/stable/1121490>
Accessed: 19/03/2009
16. Wernikoff, M. Steven , Extending Sixth Amendment Speedy Trial Protection To Defendants Unaware Of Their Indictments, The Journal Of Criminal Law & Criminology Vol. 83, No. 4 Copyright 1993 by Northwestern University, School of Law, Printed in U.S.A.

17. WHAT IS A FAIR TRIAL?, A Basic Guide to Legal Standards and Practice,
March 2000, Lawyers Committee for Human Rights,
http://www.humanrightsfirst.org/pubs/descriptions/fair_trial.pdf

Thesis

1. Abate, Nikodioms Alemayehu, Ethnic Federalism in Ethiopia: Challenges and Opportunities, university of Lund, 2004
2. Hailegabriel, Debebe, Prosecution of Genocide at International and National courts: A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/Rwanda', a dissertation submitted in partial fulfillment of the requirements of the degree LLM (Human Rights and Democratization in Africa), Faculty of Law, University of Pretoria

Internet sources

1. Pennsylvania Legislator's Municipal Desk book, Third Edition (2006),
http://www.lgc.state.pa.us/deskbook06/Issues_Citizens_Rights_03_Procedural_Due_Process.pdf, last visited March 11, 2009
2. United Nations cite, www.ohchr.org/english/law/htm
3. Official site set up for Nuremberg trial
<http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/nuremberg.htm>,
visited on march 25, 2009
4. <http://news.bbc.co.uk/2/hi/7857753.stm>
5. <http://www.un.org/apps/news/storyAr.asp?NewsID=10344&Cr=rwanda&Cr1>,
visited March 28, 2009
6. <http://www.state.gov/r/pa/ei/bgn/2861.htm>

7. International Criminal Tribunal for Rwanda, achievements of the ICTR
<http://69.94.11.53/ENGLISH/factsheets/achievements.htm>, visited on March 29, 2009
8. Action Professionals' Association for the People, APAP, research on the status of human rights in the Ethiopian legal system.
<http://www.apapeth.org/Articles/HRMechanismsEthiopia.html>, visited on March 29, 2009
9. <http://www.preventgenocide.org/law/domestic/ethiopia.htm>, the country ratified the convention on July 1949, visited March 29, 2009
10. Human Watch report available at
<http://www.hrw.org/reports/pdfs/ethiopia/ethiopia94d.pdf>, (visited August 7, 2009) and <http://www.hrw.org/reports/1997/ethiopia/Ethio97d-03.htm>, (visited August 8, 2009)
11. The annual reports of Amnesty International report on Ethiopia, 1997, available at
<http://www.amnesty.org/ailib/aireport/ar97/AFR25.htm>, (visited August 7, 2009)
12. <http://www.scaruffi.com/politics/dictat.html>, visited August 14, 2009
13. Amharic version is available on a weekly newspaper at
<http://www.ethioianreporter.com/module.php?name=News&file=article&sid=113>
[10](#). visited on September 27, 2009. And
<http://www.ethioianreporter.com/module.php?name=News&file=article&sid=113>
[28](#). See also
<http://www.ethioianreporter.com/module.php?name=News&file=article&sid=113>
[27](#), visited on September 27, 2009.

14. <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/d8925328e178f8748025673d00599b81?Opendocument>.